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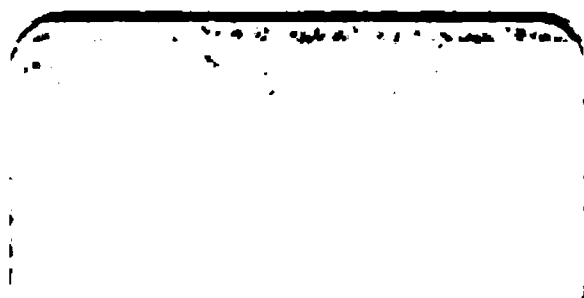
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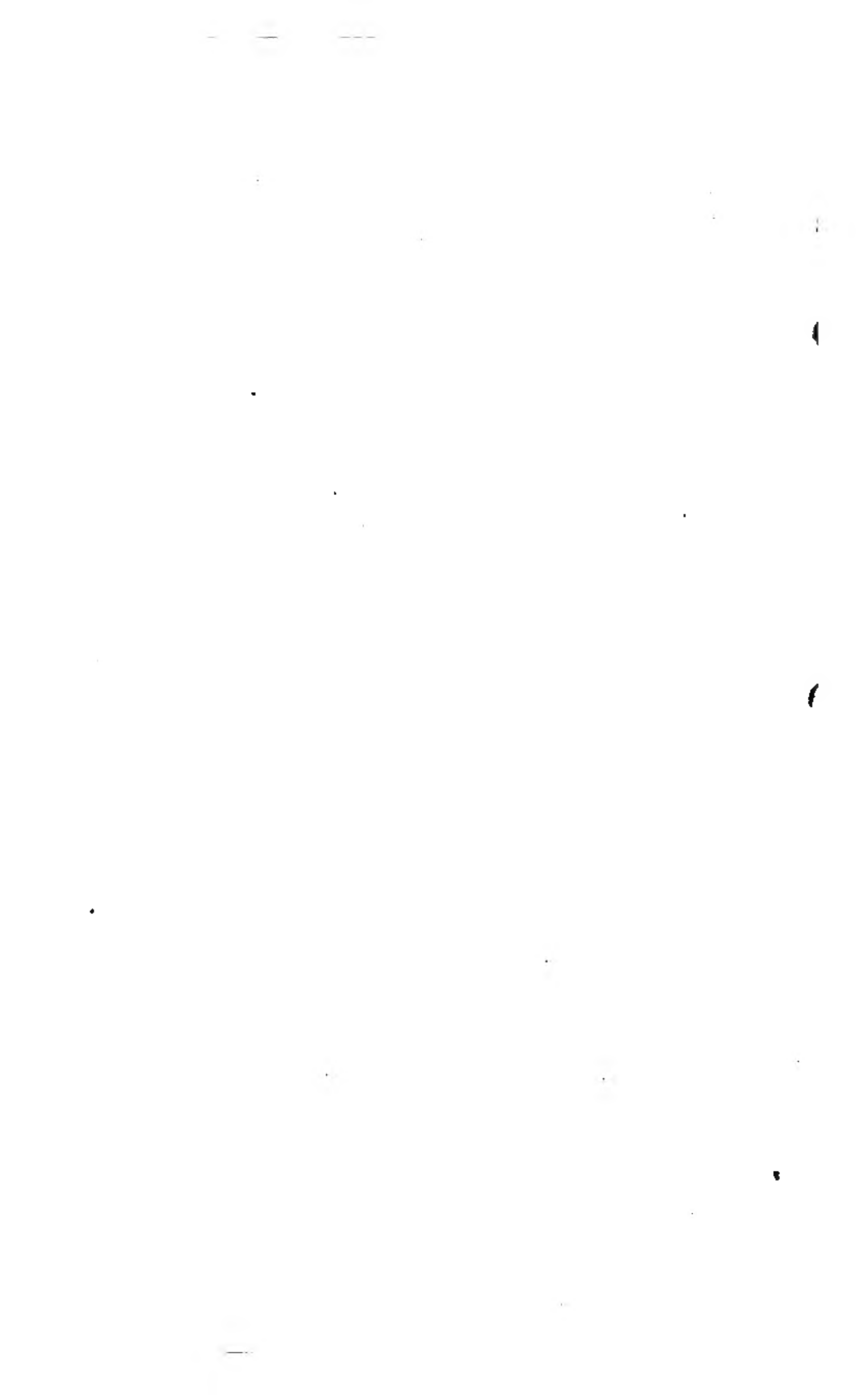


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OF
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IN THE
SUPREME COURT
OF THE
STATE OF MONTANA

FROM FEBRUARY 24, 1904, TO JUNE 22, 1904.

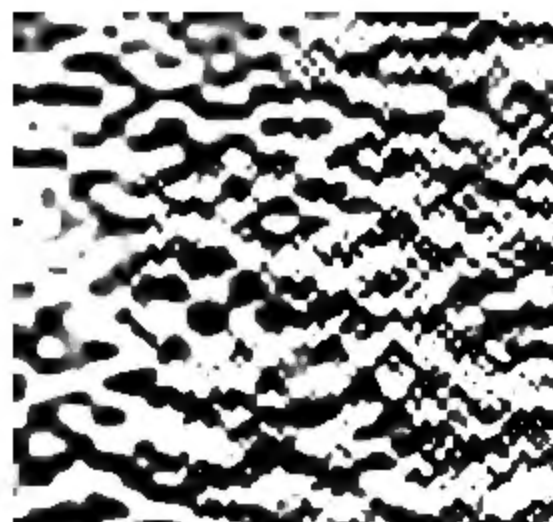
0 OFFICIAL REPORT.

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The opinions in this volume of the Montana Reports have been edited and are reported, under the supervision of the justices, by Oliver T. Crane, Esquire. On February, 1905, Mr. Crane resigned the position of reporter, before this volume was completed. The justices thereupon directed me to complete it under their supervision. At the time of Mr. Crane's resignation, this volume was in permanent form up to page 465. The matter found on pages I to XLVI, and on pages 576 to 686, was prepared by me.

A. C. SCHNEIDER.

JUSTICES
OF
The Supreme Court of the State of Montana,
DURING THE TIME OF THESE REPORTS.

THE HON. THEO. BRANTLY, Chief Justice
THE HON. GEORGE R. MILBURN, } Associate Justices.
THE HON. WILLIAM L. HOLLOWAY, }

COMMISSIONERS:
HON. JOHN B. CLAYBERG,
HON. LEW. L. CALLAWAY,
HON. W. H. POORMAN.

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FRANK W. METTLER, First Ass't Attorney General.
EDGAR M. HALL, Second Ass't Attorney General.
JOHN T. ATHEY, Clerk.
MARSHALL N. RACE, Marshal.
AUGUST C. SCHNEIDER, Court Stenographer.

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ADMITTED FROM JULY 16, 1904, TO MARCH 22, 1905.

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SCHULTZ, HENRY C.

SHELTON, E. M.

SLATTERY, JOHN L.

DIRECTORY

OF THE

Judicial Districts of the State of Montana.

1905.

FIRST JUDICIAL DISTRICT.

County of Lewis and Clarke. County Seat, Helena.

District Judges: Hon. Henry C. Smith; Hon. James M. Clements.

Officers: County Attorney, Leon A. La Croix, Esq.; Clerk of District Court, Sidney Miller; Sheriff, Peter Scharrenbroich.

SECOND JUDICIAL DISTRICT.

County of Silver Bow. County Seat, Butte.

District Judges: Hon. John B. McClernan; Hon. George M. Bourquin; Hon. Michael Donlan.

Officers: County Attorney, J. E. Healy, Esq.; Clerk of District Court, W. E. Davies; Sheriff, J. J. Quinn.

THIRD JUDICIAL DISTRICT.

Counties of Deer Lodge, Powell and Granite.

District Judge, Hon. George B. Winston.

Officers of Deer Lodge County (County Seat, Anaconda)—
County Attorney, John H. Tolan, Esq.; Clerk of District Court, Ira C. Gnose; Sheriff, T. J. Fleming.

Officers of Powell County (County Seat, Deer Lodge)—
County Attorney, O'B. O'Bannon, Esq.; Clerk of District Court, R. Lee Kelly; Sheriff, Jas. C. Barnden.

Officers of Granite County (County Seat, Philipsburg)—
County Attorney, George A. Maywood, Esq.; Clerk of District Court, George O. Burke; Sheriff, Finley McDonald.

FOURTH JUDICIAL DISTRICT.

Counties of Missoula and Ravalli*.

District Judge, Hon. F. C. Webster.

Officers of Missoula County (County Seat, Missoula)—County Attorney, W. L. Murphy, Esq.; Clerk of District Court, R. W. Kemp; Sheriff, Davis Graham.

Officers of Ravalli County (County Seat, Hamilton)—County Attorney, C. B. Calkins, Esq.; Clerk of District Court, A. C. Bahn; Sheriff, Wm. F. Cook.

*The Act of the Ninth legislative assembly (1905), creating the County of Sanders and adding same to the Fourth judicial district, will not take effect until March 1, 1906. Hence names of officers of that county are omitted from this report.

FIFTH JUDICIAL DISTRICT.

Counties of Beaverhead, Jefferson and Madison.

District Judge, Hon. Llewellyn L. Callaway.

Officers of Beaverhead County (County Seat, Dillon)—County Attorney, Henry R. Melton, Esq.; Clerk of District Court, F. A. Hazelbaker; Sheriff, M. L. Gist.

Officers of Jefferson County (County Seat, Boulder)—County Attorney, C. R. Stranahan, Esq.; Clerk of District Court, George Pfaff; Sheriff, A. F. Gibson.

Officers of Madison County (County Seat, Virginia City)—County Attorney, S. V. Stewart, Esq.; Clerk of District Court, J. G. Walker; Sheriff, Charles Kadell.

SIXTH JUDICIAL DISTRICT.

Counties of Park, Carbon and Sweet Grass.

District Judge, Hon. Frank Henry.

Officers of Park County (County Seat, Livingston)—County Attorney, A. P. Stark, Esq.; Clerk of District Court, Arthur Davis; Sheriff, A. S. Robinson.

Officers of Carbon County (County Seat, Red Lodge)—County Attorney, Sydney Fox, Esq.; Clerk of District Court, E. E. Esselstyn; Sheriff, M. W. Potter.

Officers of Sweet Grass County (County Seat, Big Timber)—
County Attorney, J. E. Barbour, Esq.; Clerk of District Court,
H. C. Pound; Sheriff, O. A. Falling.

SEVENTH JUDICIAL DISTRICT.

Counties of Yellowstone, Custer, Dawson and Rosebud.

District Judge, Hon. Chas. H. Loud.

Officers of Yellowstone County (County Seat, Billings)—
County Attorney, H. L. Wilson, Esq.; Clerk of District Court,
F. H. Foster; Sheriff, W. P. Adams.

Officers of Custer County (County Seat, Miles City)—
County Attorney, T. J. Porter, Esq.; Clerk of District Court,
A. T. McAusland; Sheriff, W. E. Savage.

Officers of Dawson County (County Seat, Glendive)—County
Attorney, C. C. Hurley, Esq.; Clerk of District Court, Harry
Sample; Sheriff, G. W. Wolloams.

Officers of Rosebud County (County Seat, Forsyth)—County
Attorney, J. C. Lyndes, Esq.; Clerk of District Court, D. J.
Muri; Sheriff, J. Z. Northway.

EIGHTH JUDICIAL DISTRICT.

County of Cascade. County Seat, Great Falls.

District Judge, Hon. Jere B. Leslie.

Officers: County Attorney, H. S. Green, Esq.; Clerk of Dis-
trict Court, Chas. P. Proctor; Sheriff, Edward Hogan.

NINTH JUDICIAL DISTRICT.

Counties of Gallatin and Broadwater.*

District Judge, Hon. W. R. C. Stewart.

Officers of Gallatin County (County Seat, Bozeman)—
County Attorney, A. J. Walrath, Esq.; Clerk of District Court,
C. B. Anderson; Sheriff, E. M. Reynolds.

Officers of Broadwater County (County Seat, Townsend)—
County Attorney, J. A. Matthews, Esq.; Clerk of District Court
F. Bubser; Sheriff, J. W. Munden.

*By Act of the Ninth legislative assembly (1905) Meagher County was detached from the Ninth and added to the Tenth judicial district.

TENTH JUDICIAL DISTRICT.

Counties of Fergus and Meagher.*

District Judge, Hon. E. K. Cheadle.

Officers of Fergus County (County Seat, Lewistown)—
County Attorney, R. E. Ayers, Esq.; Clerk of District Court,
J. B. Ritch; Sheriff, L. P. Slater.

Officers of Meagher County (County Seat, White Sulphur
Springs)—County Attorney, N. B. Smith, Esq.; Clerk of Dis-
trict Court, A. C. Grande; Sheriff, C. H. Sherman.

*Meagher County added to Tenth judicial district by Act of Ninth
legislative assembly (1905).

ELEVENTH JUDICIAL DISTRICT.

Counties of Flathead and Teton.

District Judge, Hon. John E. Erickson.

Officers of Flathead County (County Seat, Kalispell)—
County Attorney, W. T. McKeown, Esq.; Clerk of District
Court, J. K. Lang; Sheriff, O. P. Gregg.

Officers of Teton County (County Seat, Chouteau)—
County Attorney, P. I. Cole, Esq.; Clerk of District Court,
S. McDonald; Sheriff, K. McKenzie.

TWELFTH JUDICIAL DISTRICT.

Counties of Chouteau and Valley.

District Judge, Hon. John W. Tattan.

Officers of Chouteau County (County Seat, Fort Benton)—
County Attorney, Chas. N. Pray, Esq.; Clerk of District Court,
C. H. Boyle; Sheriff, Frank McDonald.

Officers of Valley County (County Seat, Glasgow)—
County Attorney, J. J. Kerr, Esq.; Clerk of District Court,
C. C. Beede; Sheriff, W. S. Griffith.

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RULES

OF THE

Supreme Court

OF THE

State of Montana

IN FORCE FEB. 1, 1905.

RULES.

I.

RECORD OF COMMISSIONS AND OATHS.

The commissions and oaths of the justices and clerk of this court and the attorney general, shall be recorded in the records of this court.

II.

ORIGINAL PROCEEDINGS.

1. Proceedings commenced in this court originally to obtain writs of habeas corpus, injunction, review, mandate, quo warranto, and other remedial writs or orders, shall be commenced and conducted in the manner prescribed by the Code of Civil

Procedure for the conduct of such proceedings in the district court.

2. The application for the issuance of any of the above writs or orders, except habeas corpus, must set forth, in addition to the other requisite matters, the reasons which render it necessary that the writ should issue originally from this court, and the sufficiency or insufficiency of the reasons so set forth will be determined by the court in awarding or refusing the writ or order.

3. Application for writs of review shall set out copies of the judgment or orders sought to be annulled or modified.

4. In all proceedings and actions commenced in this court originally, the plaintiff shall file his application with the clerk of this court prior to its presentation to this court.

5. In all proceedings and actions commenced in this court originally each party shall file with the clerk of this court at or before the time set for final hearing, eight copies of the brief of his argument, containing a recital of the facts and exhibiting a clear statement and orderly arrangement of the points of law to be discussed and the authorities relied upon in support of each point. Said brief shall be printed in conformity to the requirements of Subdivision 1 of Rule X of this court, unless, upon application and for good cause shown, the court order otherwise. A failure to comply with the requirements of this subdivision may result in a dismissal of the proceedings or action, or a refusal to hear the party in default.

6. Unless otherwise ordered, the hearing of an original proceeding or action will not be had on the return day. After issue joined, the court will, on its own motion or on motion of either party, advance the cause or appoint a time for the hearing. Otherwise the cause must stand for hearing in its chronological order.

7. Application to this court for writs or orders must be presented by the parties in person, or by counsel, and in open court; under no circumstances will the court entertain such application when made through the medium of the clerk; provided always, that motions to advance, to reinstate, to dismiss, to affirm, to

modify, to strike out, to tax or to allow costs, to quash, for rehearings, to correct the transcript, motions based upon suggestions of diminution of the record, motions for substitutions of parties, and motions touching the time of filing or serving briefs, may be presented by filing the same with the clerk, and will be considered in regular order.

III.

CERTIFICATES OF PROBABLE CAUSE.

Application for Certificate of Probable Cause.—Application for the certificate of probable cause of appeal provided for in Section 2278, Penal Code, may be made to a justice of this court only after application and refusal thereof by the judge of the court in which the conviction was had, or upon proof of his absence, or inability to act, and upon at least three days' notice to the county attorney. The applicant shall produce at the hearing the proposed record on appeal, or the settled bill of exceptions, or certified copy thereof.

IV.

APPEALS IN CIVIL CASES.

1. *Record on Appeal.*—Appellant is charged with the duty of having the transcript perfected and filed with the clerk of this court, in accordance with the statutes and these rules.

2. *Time of Filing.*—The transcript shall be filed by the appellant with the clerk of this court within sixty days after such appeal is perfected; or the appeal will be subject to dismissal on motion of the adverse party; but if it appear that the delay has been without laches on the part of appellant, his appeal will not be dismissed for such delay, until reasonable time is allowed for filing the record.

3. *Motion to Dismiss for Laches.*—Motion to dismiss an appeal for failure to file the record within the time required, shall be accompanied by a certified copy of the notice of appeal, and praecipe, if one has been filed; and a certificate of the clerk of the trial court, showing whether the case was originally in-

stituted in the district court, or was there on appeal from an inferior court, and the nature, amount and date of judgment or order appealed from; the date of filing notice and undertaking on appeal; the date of service of such notice, and whether appellant has requested or received a duly certified transcript, and the time of such request, or delivery thereof, as the case may be. No appeal shall be dismissed for failure to file the record within the time required by these rules, unless the motion to dismiss shall have been filed, and notice thereof given to the appellant, prior to the filing of the record.

4. *Suggestion of Diminution.*—Nor shall the appeal be dismissed because the transcript is imperfect, it not being prepared as directed by the praecipe; but this court will, on suggestion of diminution, order the clerk of the trial court to correct the transcript, or supply the portions lacking, as the case may require.

Respondent may likewise make suggestions of diminution of record in any respect he may deem necessary; whereupon, if the suggestion appears to be proper, an order will be made requiring such parts of the record suggested to be certified to this court.

5. *Correction of Error in Record.*—Either party may, in writing, suggest error or defect, wherein the transcript does not conform to the original, and, upon notice to the adverse party, obtain an order of this court requiring the clerk of the trial court having in custody the original record, either to compare and correct the transcript on file in this court, or to certify a supplemental transcript of such parts of the record as may be thus questioned. If such error or defect be disputed by the adverse party the suggestion must be verified in the manner required by law for verification of pleadings.

Applications under Sections 4 and 5 of this Rule shall be made upon five days' notice to the adverse party.

V.

PROOF OF EXCEPTION.

Proof of Exception.—In case any judge of the district court fail or refuse, upon proper presentation or request, to allow, settle and certify an exception, or statement of the case, in accordance with the facts and the law and practice in such cases, the party aggrieved may, within twenty days thereafter, present to this court, or any two justices thereof, a petition verified by the oath of the party aggrieved, or his attorney, setting forth the facts in relation to such failure or refusal; and thereupon this court, or such justices thereof, will, if sufficient grounds appear therefor, issue an order granting leave to the petitioner to prove before a referee to be named in such order, or by depositions, to be taken in the manner prescribed by statute, the fact in relation to such exception, or bill of exceptions, or statement of the case, and the failure or refusal to allow, certify or settle the same.

A copy of such order to be served on the adverse party to the action or proceeding, wherein such failure or refusal is alleged to have occurred, or his attorney, together with the notice of the time and place of taking such testimony.

VI.

TRANSCRIPTS—HOW PREPARED.

1. In all civil cases wherein insufficiency of the evidence to justify the verdict or decision of the court is relied upon by the appellant, the transcripts shall be printed on unruled white, uncalendered book paper, ten inches long by seven inches wide, with a margin on the outer edge not less than two inches wide. Small pica solid is the smallest letter and most compact form of composition allowed.

2. In all criminal cases, and in all civil cases except as specified in Subdivision 1 above, the transcripts shall be plainly written with a typewriter with record ink, on one side of white typewriter paper, eight and one-half inches wide and thirteen

inches long, with a margin of one and one-half inches on the left hand side of the page, and securely fastened at the side, and shall be bound in black pasteboard covers. In no case shall carbon copies be filed in this court.

VII.

ARRANGEMENT OF TRANSCRIPT.

1. *First Page and Cover.*—On the first page and cover of all transcripts must be stated the title of this court, the title of the case in the court below (substituting for the words Plaintiff or Defendant, the words “Appellant” or “Respondent,” as the case may require), the names of counsel for appellant and respondent, and the words “Transcript on Appeal” followed by a statement of the district and county from which the appeal is taken. The first paper in all transcripts must state the title of the court and case as in the court below; but from all the following papers, orders or proceedings it must be omitted, and the name of the paper, order or proceeding simply given.

2. *Arrangement and Index.*—The transcript shall be chronologically arranged, and contain an index, showing the page of each pleading, document, exhibit, order and proceeding, and the testimony or affidavit of each witness comprised therein.

Each transcript must be paged at the top and the lines numbered on the left margin of the page, except that in printed transcripts only every tenth line need be numbered.

3. *Testimony to be in Narrative Form.*—Unless otherwise ordered by the district court, the testimony shall be reduced to narrative form, and if not so reduced may be stricken out; *Provided*, however, that in equity cases and in matters and proceedings of an equitable nature, wherein questions of fact arising upon the evidence presented in the record are to be submitted for review by this court, the testimony relating to such questions shall be presented by question and answer.

4. *Identification of Matter Referred to in Exceptions or Motions.*—Where an exception refers to matters in pleadings, evidence or other proceedings, which the court struck out, or

refused to strike out, on motion, such exception must recite the matter in question.

5. *Summons, Writs and Formal Parts of Papers Omitted.*—In no case shall the summons or other process or writ be inserted in a transcript unless a question arise in respect to the same. Unless some question is predicated upon the formal parts of pleadings, motions, depositions, exhibits or other papers filed in the trial court, and made part of the record on appeal, the same must be omitted in preparing the record, after once stating the venue and title, giving the names of the parties in full, and thereafter the venue and title may be indicated by the words “title of case” and likewise.

a. *Formal Parts of Depositions.*—Notices, interrogatories, certificates of officers taking the same, signatures of witnesses, etc., may be omitted, the substance of the testimony contained in the depositions being reduced to narrative form.

b. So with deeds, mortgages, contracts and other exhibits, the endorsement thereon of certificates of acknowledgment and recording may be omitted, and only the material part stated.

c. All endorsements made by officers may be omitted in preparing the record, except the date of the filing of papers in the trial court, which ought to appear in the record by simply noting “filed,” giving the date of filing.

d. No paper shall be printed or written in the transcript more than once. Instead of repetition, appropriate reference may be made.

6. *Compliance Enforced.*—A strict compliance with the foregoing requirements will be exacted in all cases, whether objection be made by the opposite party or not; and for any violation or neglect in these respects which is found to obstruct the examination of records, the appeal may be dismissed, or the court may order the offending party to pay the costs of such transcript, or any part thereof, unless the matter objected to is inserted by order of the court or judge below.

VIII.

ORIGINAL EXHIBITS.

1. *Incorporation of an Original Exhibit in the Record.*—Whenever in the trial of an action or other proceeding appealed to this court, an exhibit of a printed book or pamphlet or other printed or engraved matter, or a model, drawing, map, trade mark, plans or illustrations, or other matter formed, drawn, printed or engraved, is introduced or offered in evidence, and it is desired by either party to use the same original exhibit as part of a statement on motion for a new trial, or in a bill of exceptions, such exhibit, authenticated by a certificate of the judge of the trial court thereon or attached thereto, may be brought to this court in its original form as introduced in evidence, either bound in the transcript of the record on appeal, if convenient to do so, or as an exhibit accompanying such record to this court. Any such exhibit bound in the record filed in this court shall not be withdrawn; but any such exhibit not bound in the record may be withdrawn after determination of the case by order of the court or any justice thereof.

2. Whenever the record contains a transcript of any document, writing, map, drawing, engraving, or printed matter, which was introduced in evidence, in a case brought to this court on appeal, and it is deemed expedient to have the same here for examination in the original form, an order will be made requiring the officer or party having the same in custody to place such original exhibit in the custody of the clerk of this court. Any such exhibit may be withdrawn by the party entitled to the custody thereof, after determination of the appeal, by application to the clerk of this court.

IX.

SERVICE AND FILING OF TRANSCRIPTS.

1. In all cases, civil and criminal, the transcript shall be filed, and a copy thereof served upon the adverse party or his attorney within five days after the filing of the same, and if

there be more than one adverse party appearing by different attorneys, on each party or the attorney of each party so appearing.

2. In cases wherein transcripts are required to be printed, a duly authenticated printed copy thereof shall constitute the record of the case in this court.

3. When transcripts are printed, a copy shall be lodged with the clerk for each of the justices.

4. In criminal cases no copies of the transcript need be served.

X.

BRIEFS.

1. *Size.*—Briefs shall be printed upon paper of the same character, with type of the same size, and the pages shall be of the same dimensions, as provided by these Rules with respect to transcripts, which are required to be printed.

2. *Time of Filing and Service.*—The counsel for appellant shall file with the clerk of this court eight copies, and serve on opposing counsel one copy of the printed brief, within forty-five days after the transcript is filed in this court, except in cases advanced on the calendar, in which cases briefs shall be filed and served within such time as may be ordered by the court in the order of advancement.

3. *Contents of Brief.*—The appellant's brief shall contain, in the order here stated:

a. A concise abstract or statement of the case, presenting succinctly the questions involved, and the manner in which they are raised. The abstract shall refer to the page numbers in the transcript in such a manner that pleadings, evidence, orders and the judgment may be easily found; *Provided*, that in cases in which the transcripts are not printed, the briefs shall contain so much of the record as is necessary to make out the appellant's case, with reference to the transcript by page and marginal numbers.

b. A specification of errors relied upon, which shall be numbered and shall set out separately and particularly each error intended to be urged. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be instructions given or instructions refused.

c. A brief of the argument, exhibiting a clear statement of the points of law to be discussed, with a reference to the page of the record, and the authorities relied upon in support of each point.

d. Citation of authorities shall be by title of case, and volume and page of report.

e. After the brief on behalf of the appellant has been filed, no motion for leave to amend the same by inserting therein, or adding thereto, any specification of error, or by incorporating new matter of substance in the statement or abstract of the case, will be entertained. By consent of respondent, in writing, and without leave of court, the brief may be amended in the particulars mentioned or in any other respect, or a new brief may be filed at any time before the cause is submitted. The court will, in proper cases, upon seasonable application and upon such terms as it may prescribe, permit the brief to be amended, or a new brief filed, so as to meet the requirements of Subdivision 1 and of Paragraphs *c* and *d* of this subdivision. Upon its own motion, and in its discretion, the court may, at any time, order a brief to be amended or changed in any particular, or a new brief filed.

4. *Respondent's Brief.*—Counsel for respondent shall file with the clerk eight printed copies of his brief and serve one upon counsel for appellant within forty-five days after appellant's brief shall have been served upon him. His brief shall be of like character with that required of appellant, omitting any specification of errors, and a statement of the case, unless that presented by the appellant is controverted.

5. *Failure to File Briefs.*—When, according to this Rule, appellant is in default, the case may be dismissed on motion; and when a respondent is in default, he will not be heard except on consent of his adversary or by request of the court.

6. No extension of time for filing briefs shall be allowed, except upon a showing that such extension is necessary.

XI.

ORAL ARGUMENT.

One hour and ten minutes will be allowed to appellant and fifty minutes to respondent for argument and no more, without special leave of court granted before the argument begins.

XII.

CALENDAR.

1. Cases shall be placed upon the calendar by the clerk in the order in which they are filed and docketed.

2. *Setting Cases for Argument.*—As often as found convenient cases will be set for argument by the court, as reached in the order in which they stand upon the docket, except such cases as are determined to be entitled to precedence, or as otherwise ordered by the court.

3. *Advancement of Cases.*—Appeals in criminal cases; appeals from orders dissolving, or refusing to dissolve, granting or refusing to grant, writs of injunction; appeals from orders dissolving or refusing to dissolve attachments; appeals from orders appointing or refusing to appoint receivers, and from orders refusing to vacate orders appointing receivers; appeals from orders or judgments holding appellant in custody; and all original proceedings, are entitled to precedence, and will, upon motion of either party, be advanced on the calendar.

4. *Short Cases.*—There will be placed upon the short cause calendar, cases in which it is made to appear to the satisfaction of the court that the cause depends solely upon the former decisions of this court.

5. *Submissions on Briefs.*—Cases on appeal may be submitted on briefs at any time by filing stipulation of counsel to that effect, which cases will then be considered and determined when reached in chronological order.

XIII.

PETITIONS FOR RE-HEARING.

Petitions for re-hearing, stating the grounds, points and authorities relied on, may be filed within fifteen days after the decision of the court, and a copy thereof served upon the adverse party, who may present objections thereto within ten days after such service. The petition for re-hearing will be considered without argument.

XIV.

SUBMISSIONS OF MOTIONS.

1. *Motions to be Filed and Copy Served.*—All motions shall be printed or typewritten, stating the grounds thereof, and filed, and copy served on counsel for adverse party, if any counsel has entered an appearance; otherwise on the clerk of the court for the party or counsel.

2. *Motions Determined Without Argument.*—Unless otherwise ordered, motions will be considered and disposed of without argument; but citation of authorities may accompany the motion.

3. *Motions.*—Motions shall be printed or typewritten, accompanied by citation of authorities relied on, and filed; and copy thereof served on the adverse party at least ten days before the time set for hearing on the merits, or within such time as may be fixed by the court. Thereupon the adverse party may, within ten days after the service thereof, or within such time as may be allowed by the court, file and serve on the other, his brief in opposition to the motion. Such motion shall then be considered and disposed of by the court without argument.

XV.

PERMISSION TO TAKE RECORD FROM CLERK'S OFFICE.

The record and other papers of this court shall not be taken therefrom except by counsel, on permission of the clerk, and when so taken shall not be retained out of the clerk's office more than ten days in any case, and shall be returned within a shorter period upon notice.

XVI.

PROCEDURE IN CASE OF DEATH, DISABILITY OR TRANSFER OF INTEREST.

In event of the death, disability or transfer of interest of a party to an appeal pending in this court, such fact shall be suggested in writing, and (unless the cause of action abate) the legal representative of the party deceased or disabled, or successor to the party transferring his interest, shall, on motion, be substituted.

XVII.

COSTS ON APPEAL.

To Whom Taxed.—In all cases the costs of appeal shall be taxed against the unsuccessful party, unless otherwise ordered by this court, and the remittitur shall be accompanied by an itemized statement of such costs as are paid to the clerk of this court.

In all such cases the clerk of this court shall, unless otherwise directed by the court, include in the order or judgment of affirmance, reversal or modification, and in the remittitur, a clause awarding the costs of appeal to the prevailing party, appellant or respondent, to be recovered of the unsuccessful party after ascertainment or taxation thereof in the court below in the manner prescribed by law.

XVIII.

ASSESSMENT OF DAMAGES FOR APPEAL WITHOUT MERIT.

If the court is satisfied from the record, and the presentation of the appeal, that the same was taken without substantial or reasonable ground, but apparently for purposes of delay only, such damages may be assessed, on determination thereof, as from the circumstances are deemed proper.

XVIIIa.

JUDGMENT BOOK.

The clerk of the court shall keep a book to be known as the "Judgment Book," in which he shall enter all judgments rendered in actions and proceedings originally instituted in this court.

XIX.

REMITTITUR, WHEN ISSUED.

Remittitur may, in cases where it is deemed proper, be ordered forthwith; otherwise the same shall be issued on application at any time after fifteen days after decision, unless motion for re-hearing or modification of judgment or order has been made.

A copy of the opinion must accompany the remittitur when the judgment or order of the trial court is reversed or modified and the case remanded for further proceedings other than the entry of a final judgment or order determining the proceedings in the trial court.

XX.

MANDATE FROM UNITED STATES SUPREME COURT—PROCEDURE THEREON.

Upon the receipt by the clerk of this court of a mandate from the Supreme Court of the United States in any case at law or in equity, theretofore taken from this court by writ of error or appeal to said supreme court, it shall be the duty of

said clerk forthwith to issue under his hand and the seal of this court a remittitur to the district court of the district and county in which the judgment was rendered, commanding such court to take such action in the premises as by the mandate shall be proper, and said remittitur shall also contain therein a recital in *haec verba* of the said mandate, and all the costs subsequent to the appeal from said district court shall be taxed in such remittitur.

XXI.

APPEALS FROM INJUNCTION ORDERS.

Upon appeal from injunction orders, if the appellant desires to continue in force the injunction order dissolved by the district court, or to obtain such an injunction order pending the appeal, he shall file in this court his sworn application, setting forth the proceedings appealed from, and the relief desired, and present with it to this court a verified copy of the affidavits or evidence used on the hearing in the court below. Such applications will be heard *ex parte* and without argument, and the court, upon such record, will make such order in the premises as may be proper.

XXII.

ADMISSION OF ATTORNEYS.

1. *Admission Upon Examination.*—Examination of candidates for admission to practice law in the courts of this state will be held in open court in the court room, at 10 o'clock a. m., on the second days of the June and December terms of each year. Any person desiring to enter for examination, must, at least ten days prior to the date of such examination, file with the clerk his verified petition, setting forth that he is a citizen of the United States, or a resident of this state who has *bona fide* declared his intention to become a citizen in the manner required by law, and that he is of the age of twenty-one years. He shall also file with his petition a certificate of two reputable counselors-at-law that he has been engaged in the study of law

for two successive years prior to the making of his application. He shall also file with his petition testimonials of his good moral character, which must be satisfactory to the court.

If the court is satisfied with the petition, and papers accompanying the same, the name of the applicant will be entered as a candidate for examination. He will be at once notified by the clerk of the acceptance or rejection of his application for examination.

The examination will be principally in writing. All candidates will be required at the commencement of the examination to state, upon their oaths, that they will not seek or accept aid from any one in answering questions, or tender or render any such aid to another; that they will not consult any books or persons during any recess that may be granted, and that they will not remove from the court room any of the examination papers, or make copies of any of the same.

Examinations will be strict both as to elementary principles and the Codes and practice of this state.

2. *Admission of Attorneys from Other Jurisdictions.*—Section 394 of the Code of Civil Procedure, 1895, is as follows: “Every citizen of the United States or person resident of this state who has *bona fide* declared his or her intention to become a citizen in the manner required by law, who has been admitted to practice law in the highest court of another state, or of a foreign country, where the common law of England constitutes the basis of jurisprudence, may be admitted to practice in the courts of this state, upon the production of his or her license, and satisfactory evidence of good moral character; but the court may examine the applicant as to his or her qualifications.”

Candidates for admission under this section may make application in open court at any time. Application must be made upon motion of some counselor of this court, and upon the verified petition of the applicant, showing the facts recited in Section 394, Code of Civil Procedure, and also:

a. Where, with whom, and the period of time the petitioner studied law, and where he was first admitted to practice; all places in which, and the period of time he has practiced as attorney or counselor at law elsewhere than in this state.

b. Whether or not any proceedings for his disbarment, or criminal charges have been instituted or prosecuted against him in any jurisdiction, and if so, a statement of the time, place and circumstances, and the result thereof. And

c. Such petition must be accompanied by a certificate of the presiding judge of the highest trial court of record in which the petitioner last practiced, exemplified as required by the laws of this state for the exemplification of records from another state or a foreign country (Sec. 3193, C. C. P.), showing that the petitioner was of good reputation, and trustworthy in the practice of his profession as attorney and counselor at law in such jurisdiction, which petition and certificate last mentioned shall be filed and preserved in the office of the clerk of this court. If the applicant has never practiced, he shall so state and shall furnish the same evidence of good moral character that a candidate for examination is required to furnish.

d. All such applicants for admission shall be personally present in court when the motion is made.

e. If, by reason of the fact that an applicant for admission from another jurisdiction has not practiced his profession for a considerable period or at all, or if for any other reason, the court is of opinion that he should be required to pass an examination as to his qualifications, if his application in other respects conforms to the requirements for admission of attorneys from other jurisdictions, his name will be entered in the list of candidates for the next ensuing examination.

f. Every attorney admitted to practice must, before his certificate is issued to him by the clerk, take an oath to support the Constitution of the United States, and the Constitution of the State of Montana, and to faithfully discharge the duties of an attorney and counselor at law with fidelity, to the best of his

knowledge and ability. A certificate of his oath must be endorsed upon the license issued to the attorney, and a duplicate filed with the clerk.

g. All attorneys admitted to practice must sign the roll of attorneys kept by the clerk of the court, before the license is issued to them.

3. *Objections to the Admission of Applicants.*—Objection to the admission of an applicant to practice law in the courts of this state may be made by any person filing with the clerk of this court a statement setting forth the grounds thereof; and thereupon, if such objection is deemed of sufficient weight, investigation thereof will be made in such manner as the court deems appropriate.

XXIII.

Strict compliance with the foregoing rules will be required.

ORDER.—*These Rules shall take effect upon Feb. 1st, 1905, on which day all other Rules will be considered repealed.*

CASES DETERMINED
 IN THE
 SUPREME COURT
 AT THE
 DECEMBER TERM, 1903.

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. GEORGE R. MILBURN, THE HON. WILLIAM L. HOLLOWAY,	}	Associate Justices.
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COMMISSIONERS:

HON. JOHN B. CLAYBERG,
 HON. LEW. L. CALLAWAY,
 HON. W. H. POORMAN.

BICKFORD, APPELLANT, v. KIRWIN ET AL., RESPONDENTS.

30	1
34	301

(No. 1,789.)

(Submitted February 11, 1904. Decided February 24, 1904.)

Judgment Roll—Agreed Case—Waiver of Error—Lease—Construction—Liability for Rent.

1. Though there is no formal judgment roll consisting of the papers enumerated in Code of Civil Procedure, Section 1190, because there was no formal answer, yet the only papers which could be incorporated in the roll—the complaint, stipulation with exhibit attached (which the court and parties treated as amending the complaint and presenting an issue), the judgment,

and bill of exceptions—being in the record, properly certified as constituting the judgment roll, will be considered as such.

2. Where a complaint is filed giving jurisdiction, and a stipulation is then filed, treated by the court and parties as amending the complaint and raising an issue, the case is not an agreed case, which has to be submitted with the formalities required by Code of Civil Procedure, Section 2050 *et seq.*, to give jurisdiction.
3. Even if it is error for the court, in an action for rent, to undertake, at the instance of the parties, to determine defendants' liability, under the terms of the lease, for an installment of rent not in fact due at the commencement of the action, defendants, in whose favor was the decision, and who have not appealed, may not complain of such action of the court.
4. Under the first paragraph of the *habendum* clause, the property was leased to defendant for the full term of two years, unless the lease was sooner forfeited. It then provided that the lessee should pay the lessor, as rent for the premises, \$150 per month "during occupancy" thereof, and that, should the lessee fail to make such payments, the lessor might re-enter without this working a forfeiture of the rents to be paid, and that the lessee should not sublet, and should surrender the property "at the expiration of the time herein recited." *Held*, that "during occupancy" meant "while possession continues," that is, during the whole term; so that the lessee could not, before expiration of the term, surrender possession and relieve himself from liability for further rent.

Appeal from District Court, Flathead County; D. F. Smith, Judge.

ACTION by F. L. Bickford against Thomas Kirwin and others. From the judgment, plaintiff appeals. Remanded with directions.

STATEMENT OF THE CASE.

This action was brought to recover judgment against the defendants for the sum of \$450, alleged to be due as rent for the three months beginning on August 15, and ending on November 15, 1901, under a lease by the plaintiff to the defendant Kirwin of certain premises in Kalispell, Flathead county. The lease was for a term of two years from and after March 15, 1901, rent payable monthly, at the rate of \$150 per month. As construed by the parties, payment was to be made on the 15th of each month in advance. To secure the payment of the rent according to the terms of the lease, the other defendants became sureties to the plaintiff for Kirwin upon a bond, of even date with the lease, in the sum of \$1,000. Kirwin went into possession of the property and occupied it up to and including October

15, 1901, when he tendered the plaintiff the keys of the building and offered to surrender possession. He was then in default for the rent due on August 15th, and thereafter up to and including October 15th. The offer being declined, Kirwin went out of possession and refused to pay rent after that time, claiming that under the terms of the lease he had the right to surrender the property at any time and be released from all further liability. The action was thereupon commenced.

The defendants filed no answer, because they did not care to resist payment of the installments of rent already accrued; but on November 9th stipulated with the plaintiff that the complaint might be amended so as to include a demand for the installment to fall due on November 15th, and that the court might render judgment for this installment, also, if the defendants were liable for it under the contract. The stipulation stated that the plaintiff would, if the evidence was admissible, testify that the defendant Kirwin had prepared the written contract and submitted it to him for signature, and that his understanding of it was that it embodied a "straight lease" for a term of two years, to be forfeited at plaintiff's option for breach of any of its conditions by Kirwin; that the defendant would testify that he understood that he had the option to relinquish occupancy at any time and be released from liability; that the installments of rent alleged to be due up to October 15th were actually due and payable; that the installment to fall due on November 15th would be treated as due and payable at the commencement of the action; and that the sole question to be determined by the court was whether the defendants were liable for rent after Kirwin ceased to occupy the premises, which in fact he did on October 15th. To the stipulation was attached a certified copy of the lease.

The court adjudged that installments of rent had become due and payable on the 15th of August, September and October, but that the plaintiff was not entitled to recover any other installment, thus sustaining the contention of the defendants that Kirwin was to be released from liability upon ceasing to occupy

the property at any time. Judgment was accordingly entered for the plaintiff for \$450 and costs. From this judgment the plaintiff appealed, and has submitted to this court the question whether the district court correctly construed the contract.

The first paragraph of the lease is in the ordinary form, the *habendum* clause being as follows: "To have and to hold the above rented premises to the said party of the second part; his heirs, executors, administrators and assigns for and during the full term of two years from and after the (15) day of March, 1901, unless sooner forfeited." It then proceeds: "And the said party of the second part, for his heirs, executors, administrators and assigns, agrees to and with the said party of the first part, to pay his heirs, executors, administrators or assigns, as rent for the above mentioned premises, the sum of one hundred and fifty and no-100 dollars per month during occupancy of said building. And it is further agreed by and between the parties as follows: That should the said party of the second part, his heirs, executors, administrators or assigns, fail to make the above mentioned payments as herein specified, or fail to fulfill any of the covenants herein contained, then and in that case it shall be lawful for the said party of the first part, his heirs, executors, administrators or assigns, to re-enter and take full and absolute possession of the above rented premises—30 days' notice, and hold and enjoy the same fully and absolutely, without such re-entering working a forfeiture of the rents to be paid and the covenants to be performed by the said party of the second part, his heirs, executors, administrators or assigns." Then follow provisions prohibiting a subletting of the premises during the term of the lease, and requiring the lessee to quietly yield and surrender the property to the lessor "at the expiration of the time herein recited."

Mr. W. N. Noffsinger, for Appellant.

Messrs. Downing & Stephenson, and *Mr. F. L. Gray*, for Respondent.

MR. CHIEF JUSTICE BRANTLY, after stating the case, delivered the opinion of the court.

1. At the hearing the respondents submitted a motion to dismiss the appeal on the ground that the record does not contain a copy of the judgment roll. There is no merit in the motion. It is true there is no formal roll consisting of the papers enumerated in Section 1196 of the Code of Civil Procedure, for the obvious reason that no formal answer was ever filed in the cause. The only papers which could be incorporated in the roll were the complaint, stipulation—with the exhibit attached—the judgment, and bill of exceptions. There were no formal findings. All the papers mentioned are found in the record, properly certified as constituting the judgment roll, and, taken together, must be so considered. The stipulation was treated by the court and the parties as amending the complaint and presenting an issue as to the installment due on November 15th. In so far as it presented an issue on the part of the defendants as to this item, it performed the office of a formal pleading.

2. The point is also made by the respondents that the district court had no jurisdiction to render judgment at all, for the reason that, it being in fact an agreed case, the controversy was not submitted with the formalities required in such cases by Section 2050 *et seq.* of the Code of Civil Procedure. The case does not fall within the purview of these sections. They authorize judgment without action where the parties observe the necessary requirements, and the jurisdiction of the court depends upon observance of these requirements. In the present case the court acquired jurisdiction by the filing of the complaint. Any error intervening thereafter was error within jurisdiction, and subject to review only on appeal. But if it be conceded that the court was in error in undertaking, at the instance of the parties, to determine the question of the liability of the defendants, under the terms of the lease, for the installment which was not in fact due at the time the action was commenced, yet the defendants may not question its action in the premises, because the decision was in their favor, and they have not ap-

pealed. In urging this point they assume a position inconsistent with that assumed in the remainder of their argument, whereby they seek to sustain the judgment as correct.

3. Counsel for the appellant argues that the judgment, in so far as it sustains the contention of the defendants as to Kirwin's option under the lease, is erroneous. This contention submits to this court the question what meaning should be given to the expression "during occupancy of said building" in the second paragraph of that instrument. This paragraph is crude and inaccurate in its statement, in that the covenant therein expressed is on behalf of the heirs, executors, administrators or assigns of the respective parties. But from the other provisions of the instrument it is clear that the parties, in contracting with each other, intended, but failed, to follow the usual form of expression. The contention is that the anomalous expression "during occupancy of the building" is equivalent to the expression "for and during the term," the form of words ordinarily used, and granted no option whatever to the respondent Kirwin. Counsel for respondents argue that the parties in drafting the contract, used a printed form, and erased the words "for and during the term," substituting therefor the other form of expression, thus clearly indicating their purpose that Kirwin should have the option claimed. They cite Section 2216 of the Civil Code as the rule of interpretation to be applied. It does not appear, however, that a printed form was used, or that any erasure or substitution of words was made. So far as the record shows, the instrument was written by the parties at the time of its execution. Nothing appears showing the circumstances under which it was drafted and executed. The stipulation reveals nothing further than that at the time the controversy arose, on October 15th, each party insisted on its own construction of the contract. This court is therefore left to ascertain the intention of the parties from the terms employed by them. In this connection the rule must be borne in mind that the whole of a contract is to be taken together, so as to give effect to every part—if reasonably practicable—each clause helping to interpret the

other. (Civil Code, Section 2206), as well, also, as another familiar rule, that the words of an instrument, as between conflicting constructions, are to be construed most strongly against him whose words they are (Civil Code, Section 2219). Examining the instrument, we find that under the first paragraph the premises are let to the defendant Kirwin for and during the full term of two years, unless the contract is sooner forfeited. This provision is clear and explicit, and without condition, except that upon default of the lessee the landlord, at his option, may, as provided in the third paragraph, upon notice re-enter. There is no express covenant on the part of the lessee to occupy, yet that he shall do so is implied. How long should the occupancy continue? Certainly during the term, unless, by express provision or clear implication, the intention was otherwise. The forfeiture clause was clearly for the benefit of the lessor. He might or might not enforce it at his own option, although the enforcement of it would determine the lease. (Taylor's Landlord and Tenant, Section 492.) The lessee could not elect that the lease should be void upon a forfeiture of any of its covenants, nor could he vacate the premises and avoid liability for rent, except by consent of the lessor. (*Id.* Sec. 492; *Creveling v. West End Iron Co.*, 51 N. J. Law, 34, 16 Atl. 184; Wood's Landlord and Tenant, Sec. 513; *Leatherman v. Oliver*, 151 Pa. St. 646, 25 Atl. 309.)

Are the words "during occupancy of said building" in the second clause to be construed as modifying these provisions, so as to leave it optional with the lessee to enter upon the occupancy of the premises and to become liable for the rent at all? Surely not. Yet this would be the result if respondents' claim should be sustained. It is as strongly implied that he should continue his occupancy for the term as it is that he should enter upon it in the first instance, for not only is the term absolute for two years, subject only to the proviso for re-entry, but there is also a covenant in the last paragraph that the lessee should surrender the property "at the expiration of the time herein recited." This clearly manifests the intention of one to let,

and of the other to occupy, the premises for the full term of two years at the stipulated rent, subject only to the option reserved to the lessor. The second paragraph, therefore, though the expression "during occupancy" be construed most strongly against the lessor, can have no other meaning than that the rent should be due and payable at the stipulated times, so long as the landlord did not re-enter upon default and put an end to the occupancy. The expression means "while possession continues," that is, while the term continues; and the whole instrument, taking all its provisions together, must bear the construction we have given it, or else it must be held to be inoperative from the beginning. The judgment of the district court should have included the installment due on November 15th.

The cause is therefore remanded, with directions to amend the judgment accordingly.

Remanded.

STATE EX REL. DAVIS, RELATOR, *v.* DISTRICT COURT
OF THE SECOND JUDICIAL DISTRICT
ET AL., RESPONDENTS.

(No. 2,009.)

(Submitted February 9, 1904. Decided February 24, 1904.)

Guardian — Appointment — Attorneys — Substitution—Payment of Fees—Mandamus.

1. That a party becomes insane while indebted to an attorney who was representing him at the time with respect to his property interests does not give such attorney the right *per se* to appear as attorney for the party's guardian, who by reason of such appointment, as provided by Civil Code, Section 3151, becomes responsible for the estate and the proper conduct of the incompetent's affairs.
2. Where at the time of the insanity of a client he was indebted to his attorney who had charge of his interests, the appointment of a guardian for the client did not divest the attorney of any lien or security which he had at the time to secure payment of his fees.
3. Under Code of Civil Procedure, Section 2810 *et seq.*, providing for the allowance and payment of claims against the estate of an incompetent by

his guardian, a guardian appointed for an incompetent who was indebted to his attorney for fees at the time of such appointment could not pay such attorney the fees claimed to be due out of the funds of the incompetent's estate until such claim had been allowed by the court.

4. Where, from the facts stated on an application for the substitution of attorneys, it was the plain legal duty of the court to grant the application, and was without his proper discretion to refuse the same, the applicant was entitled to *mandamus* to compel the court to grant such application.
5. Under Code of Civil Procedure, Section 399, providing that an attorney in an action may be changed on the order of the court on an application of either client or attorney, after notice from one to the other, an incompetent's guardian was absolutely entitled to have a different attorney substituted to represent him, for the firm which had represented the incompetent prior to the guardian's appointment, notwithstanding the fees due such substituted attorneys have not been paid.

APPLICATION by the state, on relation of Calvin P. Davis, an incompetent, by his guardian, George W. Davis, for *mandamus* to compel the district court of the Second judicial district and E. W. Harney, judge thereof, to enter an order of substitution of attorneys. Granted.

Mr. William A. Clark, Jr., and Mr. Jesse B. Roote, for Relator.

Mr. C. P. Drennan, and Mr. George F. Shelton, for Respondents.

MR. COMMISSIONER POORMAN prepared the opinion for the court.

This is an application for a writ of mandate to compel the district court to enter an order substituting attorneys.

It appears that one Calvin P. Davis, by virtue of contracts of settlement and decrees of court entered in accordance therewith, became and is entitled to a certain distributive share of the estate of Andrew J. Davis, deceased; that he had been represented during all the time of this settlement by the law firm of Logan, De Mond & Harby, of New York, and C. P. Drennan, of Butte, Montana, and that they still appear as attorneys of record in said cause. It was agreed by Calvin P. Davis that all money coming to him should be distributed to said attorneys, and by them paid to Davis. On December 2, 1901, said Calvin P.

Davis was adjudged incompetent, and George W. Davis was appointed guardian of his estate. He qualified as such guardian January 3, 1902, and letters of guardianship were issued to him. Thereafter the attorneys, Logan, De Mond & Harby and C. P. Drennan, assumed to act as such attorneys for the estate of such incompetent, and are by the district court adjudged the right as attorneys to control the distribution of said estate. On January 24, 1902, said Calvin P. Davis, by his said guardian, after notice to Logan, De Mond & Harby and C. P. Drennan, applied to the district court for an order changing the attorneys by substituting W. A. Clark, Jr., and Jesse B. Roote in lieu of said C. P. Drennan and the firm of Logan, De Mond & Harby. The last-named attorneys contested this application. No order had been made by the court with reference to this application up to November 14, 1903, and on that day relator, by his guardian, applied to this court for a writ of mandate commanding the district court to make the order of substitution demanded. The district court, by its answer filed January 19, 1904, alleges, among other things, that on December 5, 1903, the court denied the application for such substitution, and that the said attorneys, Logan, De Mond & Harby and C. P. Drennan, "have never at any time had their names entered nor are they attorneys of record for George W. Davis as guardian of Calvin P. Davis, an incompetent person, nor said attorneys have not been, nor do they assume to be, the attorneys of said guardian in any manner whatsoever."

Neither Calvin P. Davis, an incompetent person, nor his estate, can make any appearance whatsoever, except by and through the legally appointed guardian; and if these attorneys are not the attorneys for the guardian it is not apparent by what authority they can make any appearance whatsoever in any action or matter affecting the interests of this estate. They, however, by their affidavits filed, protest against any order being made removing them as attorneys and substituting any one else, so that there may be no question that they will receive the balance of their fees.

The statute leaves parties to the exercise of their own judgment in making contracts with attorneys at law, as in the employment of other agents, and the mere fact that a party becomes insane or dies while he is indebted to the attorney who was at the time representing him with respect to his property interests does not give that attorney the right *per se* to appear as such for the guardian or administrator appointed, and who, by reason of such appointment, becomes responsible for the estate and the proper conduct of its affairs. (Section 3151, Civil Code.) Neither does such appointment divest the attorney of any lien or security which he at the time had to secure him in the amount due. In this case the guardian could not pay the attorney fee claimed to be due to this firm of attorneys out of the funds of the estate until the same had been allowed by the court, and when allowed by the court it becomes a valid charge against the estate, which the guardian cannot refuse to pay. (Section 2810 *et seq.*, Code of Civil Procedure.)

Section 399, Code of Civil Procedure, so far as applicable to this proceeding, provides that the attorney in an action may be changed "upon the order of the court upon the application of either client or attorney, after notice from one to the other." The general rule under similar statutes appears to be that a party has an absolute right to change his attorney at will, and without assigning any cause therefor, unless it appears that some good reasons exist which justify the court in refusing to make the order. (Weeks, Attorneys at Law, par. 250; *Lee v. Superior Court*, 112 Cal. 354, 44 Pac. 666; 20 Ency. Pl. and Prac. 1013.)

It is claimed by the respondents that the action of the court in refusing to make this order of substitution was a judicial act, and that such acts cannot be controlled by *mandamus*. It is elementary that *mandamus* will not lie to interfere with the exercise of a court's discretionary power. (*State ex rel. Harris v. District Court*, 27 Mont. 280, 70 Pac. 981.)

A different rule, however, prevails in matters where the court cannot exercise any discretion.

In *Rundberg v. Belcher*, 118 Cal. 589, 50 Pac. 670, the court says: "While mandate will lie to compel judicial action, and in some instances even specific action (*Wood v. Strother*, 76 Cal. 545, 18 Pac. 766, 9 Am. St. Rep. 249), and is an appropriate remedy in a proper case to obtain the relief here sought (*People v. Norton*, 16 Cal. 436), it may not be invoked to require a judicial officer to act in a particular way except it appear by necessary legal deduction from the facts stated that the aggrieved party has been denied a right which it was the plain legal duty of the officer to grant, and without his proper discretion to refuse (*Keller v. Hewitt*, 109 Cal. 146, 41 Pac. 871)." The court in that case, which was a proceeding for substitution of attorneys under a similar statute, denied the writ, because it did not appear from the record why the court had refused to grant the order.

In *Lee v. Superior Court*, *supra*, which was also an application for a writ of mandate to compel the substitution of attorneys, the record contained the reasons why the court had refused the order. The appellate court reviewed these reasons, and held that they were not sufficient, and ordered the writ to issue.

So, in this case, it appears from the record that the only reason why this application was denied was based upon the fact that the contract of employment with the contesting attorneys was coupled with an interest, and this interest was that (1) they had a right to have the money of the estate pass through their hands; (2) that they had not yet been paid their fees.

The first of these propositions is not involved in this proceeding. The second is untenable for the reasons above stated. (*Muth v. Goddard*, 28 Mont. 237, 72 Pac. 621; *Matter of Prospect Avenue*, 85 Hun. 257, 1 N. Y. Ann. Cas. 347, 32 N. Y. Supp. 1013; *Matter of Mitchell et al.*, 9 N. Y. Ann. Cas. 224, 67 N. Y. Supp. 961; *Hunt v. Rousmanier's Adm'rs*, 8 Wheat. 174, 5 L. Ed. 589.)

We therefore recommend that the peremptory writ of mandate be issued as prayed for.

PER CURIAM.—For the reasons stated in the foregoing opinion, it is ordered that the peremptory writ of mandate issue as prayed.

MOORE, APPELLANT, v. MURRAY ET AL., DEFENDANTS;
MURRAY, RESPONDENT.

(No. 1,790.)

(Submitted February 11, 1904. Decided February 24, 1904.)

*Pleadings—Denials — Sufficiency—Judgment on Pleadings—
Determination of Motion—Entry of Final Judgment.*

1. Judgment on the pleadings cannot be entered where there is an issue framed thereby.
2. Denials which are as specific as the allegations they are intended to meet, and which controvert the spirit and substance of the adverse pleading, are sufficient to raise issues.
3. Although Code of Civil Procedure, Section 741, provides that an appeal cannot be taken from a denial of judgment on the pleadings, and that subsequent proceedings of either party are not prejudiced thereby, it was proper for the court to enter judgment for defendant after overruling plaintiff's motion for judgment on the pleadings, where plaintiff, instead of proceeding to trial upon the merits, announced that he would stand on the motion as made.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

ACTION by Donald Moore against James A. Murray and others. From a judgment in favor of defendant James A. Murray, plaintiff appeals. Affirmed.

STATEMENT OF THE CASE.

The plaintiff commenced this action by filing a complaint containing, among others, the following paragraphs:

“(1) That at all the times hereinafter mentioned the defendant James A. Murray was the owner and reputed owner of the property hereinafter described, and that the defendants James

Cummings and T. J. McKenzie were the owners of an interest in said realty together with said Murray, as the plaintiff is informed and believes, and were the owners of certain improvements thereon, made by them and said Murray; and that all funds for the said improvements on said realty were made by said defendants jointly, and with moneys advanced by said Murray to said partnership in said mines for the purpose of developing the same for the benefit and use of all of the said defendants.

“(2) That between the 25th day of July, 1899, and the 17th day of February, 1900, the plaintiff rendered and performed services as miner upon the said premises, the same being under a continuous contract, amounting to 196 days' labor at the rate of \$3.50 per day, amounting in all to the sum of \$686, said work and labor being performed at the instance and request of the said James Cummings, and for the use and benefit and improvement and development of the said property, and for the use and benefit of the said defendants.

“(3) That said Cummings agreed to pay the plaintiff the sum of \$686, and said agreement was made upon the part of said defendants in their capacity of co-owners of said property. Plaintiff further avers that the said sum of \$686 was due and owing and entirely unpaid to plaintiff, and is now so due and owing at the date of commencement of this action, and when the lien hereinafter mentioned was filed.”

To the complaint is attached a copy of the mechanic's lien referred to in the complaint, which is designated “Exhibit A.”

Thereupon the defendant Murray filed an answer containing the following paragraphs:

“Now comes the defendant James A. Murray, and for himself alone, and for his separate answer to the complaint on file herein, denies that the defendants James Cummings and T. J. McKenzie were the owners, or that either of them was the owner of an interest in the realty and mining premises mentioned and described in said complaint, or that they were the owners, or that either of them was the owner, of certain or any improve-

ments thereon, or that all or any funds for any improvements of said realty and mining premises were made by defendants to this action jointly, or with money advanced by this defendant Murray, for the purpose of developing said realty and mining premises for the benefit or use of all of said defendants.

“Denies that plaintiff rendered or performed services as a miner or otherwise upon said premises for the use or benefit of this defendant, or at the request of this defendant.

“Denies that defendant Cummings agreed to pay said plaintiff the sum of \$686, or any other sum or amount whatever, upon or by virtue of any agreement made or entered into by or upon the part of this defendant, or in his capacity as co-owner of said property, or that this defendant ever promised or agreed to pay said plaintiff said sum of \$686, or any other sum or amount whatever, or in any capacity whatever.”

Upon the filing of this answer the plaintiff interposed the following motion: “Comes the plaintiff, and moves the court for a judgment upon the pleadings herein, as against the said defendant Murray, in accordance with the prayer of the plaintiff’s complaint, for the reasons that it appears from the record herein that the defendants James Cummings and T. J. McKenzie have made default herein, and thereby have admitted the allegations of the plaintiff’s complaint; that the facts and matters stated in the answer of defendant Murray do not constitute a defense or counterclaim to the plaintiff’s complaint.”

This recitation is found in the bill of exceptions: “Whereupon the said motion for judgment upon the pleadings is by the court heard and considered, and is by the court overruled, to which ruling of the court the plaintiff, by counsel, duly excepted. Thereupon the plaintiff, by his counsel, announced in open court, and immediately upon the overruling of the said motion, that the defendant Murray might have judgment, and that the plaintiff would stand upon the motion as made.”

Immediately a judgment was entered against the defendants James Cummings and T. J. McKenzie personally for the sum of \$686, with interest thereon, and costs of suit; and it was also

provided that the plaintiff take nothing against the defendant Murray, and also that the defendant Murray recover from the plaintiff his costs. No reference to the lien is found in the judgment. From this judgment the plaintiff has appealed.

Mr. J. E. Healy, for Appellant.

Mr. J. L. Wines, for Respondent.

MR. COMMISSIONER CALLAWAY prepared the statement of the case and the following opinion for the court:

If there is an issue framed by the pleadings, the court was right in refusing to grant plaintiff's motion for judgment thereon. (*Horsky v. Moran*, 13 Mont. 250, 34 Pac. 360; *Bach, Cory & Co. v. Montana L. & P. Co.*, 15 Mont. 345, 39 Pac. 291; *Floyd v. Johnson*, 17 Mont. 469, 43 Pac. 631; *Sklower v. Abbott*, 19 Mont. 228, 47 Pac. 901; *Bryant v. Davis*, 22 Mont. 534, 57 Pac. 143.)

No question has been raised by counsel as to the sufficiency of the complaint. We think material portions of it are, in effect, denied by the answer, though the latter pleading is subject to criticism.

The first paragraph of the answer is merely a literal denial of a portion of the first paragraph of the complaint, and is insufficient.

In the second paragraph of the complaint it is alleged that the plaintiff performed the work at the instance and request of Cummings, "and for the use and benefit and improvement and development of the said property, and for the use and benefit of the said defendants." The answer "denies that plaintiff rendered or performed services as a miner or otherwise upon said premises for the use or benefit of this defendant, or at the request of this defendant."

The third paragraph of the complaint contains this language: "That said Cummings agreed to pay the plaintiff the sum of \$686, and said agreement was made upon the part of said de-

fendants, in their capacity of co-owners of said property." This is met by the answer thus: "Denies that defendant Cummings agreed to pay said plaintiff the sum of \$686, or any other sum or amount whatever, upon or by virtue of any agreement made or entered into by or upon part of this defendant, or in his capacity as co-owner of said property."

Denials which are as specific as the allegations they are intended to meet, and which controvert the spirit and substance of the adverse pleading, are sufficient. (*Miles v. Edsall*, 7 Mont. 185, 14 Pac. 701.) We think the court was justified in overruling the motion.

Section 741 of the Code of Civil Procedure declares: "If a demurrer, answer, or reply is frivolous, the party prejudiced thereby, upon a previous notice to the adverse party, of not less than five days, may apply to the court or to a judge of the court for judgment thereupon, and judgment may be given accordingly. If the application is denied, an appeal cannot be taken from the determination, and the denial of the application does not prejudice any of the subsequent proceedings of either party. Costs may be awarded in the discretion of the court."

After the court overruled the motion, the plaintiff was at liberty to proceed with his proof. He was in no manner injured by the action of the court. Instead of proceeding to trial upon the merits, he saw fit to say to the court that the defendant Murray might have judgment, and it was entered accordingly. This the court could not have done rightfully in the absence of plaintiff's action in the premises, because, some of the material allegations of the complaint being denied by the answer, an issue remained to be tried. Under the circumstances the court's action was proper.

We are of the opinion that the judgment should be affirmed.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment is affirmed.

Rehearing denied March 31, 1904.

CITY OF BUTTE, RESPONDENT, v. PALTROVICH,
APPELLANT.

(No. 1,788.)

(Submitted February 10, 1904. Decided February 24, 1904.)

Municipal Corporations—Ordinances — Regulating Hours of Business—Licenses—Constitutional Law—Equal Protection of the Law—Reasonableness of Ordinances—Police Power.

1. An ordinance making it unlawful to keep open a pawnshop after 6 o'clock p. m. is not a prohibition of the business, but a regulation of it, authorized by Political Code, Section 4800, Subd. 16.
2. One taking a license to carry on the pawnshop business, which states nothing as to the hours within which the business may be conducted, takes with notice that the city may impose reasonable regulations therefor.
3. It is only where persons engaged in the same business are subjected to different restrictions, or are granted different privileges under like conditions, that the discrimination is open to the objection that it is a denial of equal protection of the law.
4. An ordinance does not deny the equal protection of the law because regulating the hours of operating pawnshops, loan offices, and second-hand stores, only.
5. In the exercise of the "police power," citizens may, for the public good, be constrained in their conduct with reference to matters in themselves lawful and right.
6. An ordinance making it unlawful to keep open a pawnshop, loan office or second-hand store after 6 o'clock p. m., except on days preceding a holiday, when they may be kept open till 10 o'clock p. m., will, in the absence of clear proof to the contrary, be held reasonable.

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

VICTOR PALTROVICH was convicted of violating an ordinance. From the judgment, and an order denying him a new trial, he appeals. Affirmed.

Mr. J. L. Wines, for Appellant.

The business of a pawnbroker is neither illegal, immoral nor against public policy. Ordinances in contravention of the general policy of state legislation upon the same subject, are void. The state has not attempted to prohibit the business of pawn-

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brokerage, and the state has only delegated to cities the power to tax, license and regulate; the power to "regulate" does not include the power to "prohibit" for any portion of the time embraced or included in the license issued to those in that business. The ordinance in question is also void as being unreasonable and in restraint of trade. (Black's Law Dictionary, 1015; Webster's Dictionary; Angell & Ames on Corporations, pages 337-349; Cooley's Constitutional Limitations, pages 191-211; 1 Dillon on Municipal Corporations, 4th Ed., Secs. 317, 319, 329, 357, 358, 366, 367, 386, 389, and notes; 17 Am. & Eng. Ency. of Law, pages 248, 253, 254; *Berling v. West*, 29 Wis. 307; *Wreford v. The People*, 14 Mich. 41; *Dunham v. Trustees of Rochester*, 5 Cowan, 462; *The Mayor v. Nichols*, 4 Hill, 209; *City of Emporia v. Volmer*, 12 Kan. 622; *City of Newton v. Belger*, 10 N. E. 464; *City of St. Paul v. Traeger*, 25 Minn. 248, 252, 253; *In re Fraser*, 63 Mich. 396; *Cosgrove v. Augusta* (Ga.), 42 L. R. A. 711; *In re Gribben*, 47 Pac. 1074; *State v. Taft* (N. Car.), 32 L. R. A. 122; *May v. People* (Colo.), 27 Pac. 1010; *Phillips v. City of Denver*, 34 Pac. 902; *In re Jacobs*, 98 N. Y. 98; *State v. Pendergrass*, 10 S. E. 1002; *City of Corvallis v. Carlile*, 10 Oregon, 139; *Chaddock v. Day*, 75 Mich. 527; *Town of Greenboro v. Ehrenreich* (Ala.), 60 Am. Rep. 130; *Jew Ho v. Williamson*, 103 Fed. 10; *City of Evansville v. Miller* (Ind.), 38 L. R. A. 161; *City of Owensboro v. Sparks*, 36 S. W. pp. 4, 5.)

Mr. Edwin M. Lamb, Mr. H. A. Bolinger, and Mr. J. L. Templeman, for Respondent.

The city council had authority to pass Ordinance No. 586, and the same is a reasonable regulation of the pawnbroking business. (Dillon's Mun. Corp. 4th Ed. Secs. 318, 328, 400; *In re Hang Kie*, 69 Cal. 149; *City Council of Greenville v. Kemmis*, 4 Mun. Corp. Cases, 523; *Bush v. Seabury*, 8 Johns. (N. Y.), 327; *Buffalo v. Webster*, 10 Wend. 100; *Cronin v. People*, 82 N. Y. 318; *Ex parte Canto*, 21 Texas App. 61; *Ex parte Byrd*, 84 Ala. 17; *Ash v. People*, 11 Mich. 347; *St. Louis*

v. *Weber*, 44 Mo. 547; *City of New Orleans v. Faber*, 29 So. Rep. 507, 5 Mun. Corp. Cases, 413; *City of Jacksonville v. Ledwith* (Fla.), 32 Am. & Eng. Corp. Cases, 382; *Grand Rapids v. Braudy* (Mich.), 32 L. R. A. 119; *Fisher v. Harrisburg*, 2 Grant's Cases, 291; *Com. v. Robertson*, 5 Cush. 438; *Marnet v. State*, 45 Ohio St. 63; *Shuman v. City of Fort Wayne* (Ind.) 11 L. R. A. 379; *Soon Hing v. Crowley*, 113 U. S. 703; *Barbier v. Connolly*, 113 U. S. 27; *Staates v. Borough of Washington* (N. J.), 43 Am. Rep. 402.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The appellant, Victor Paltrovich, was convicted in the police magistrate's court of the city of Butte of violating Ordinance No. 586 of that city. He appealed to the district court, where the cause was tried on an agreed statement of facts. The facts agreed upon are that Ordinance No. 586 was duly passed by the city council, approved by the mayor, and published and recorded as required by law; that defendant, Paltrovich, was a pawnbroker engaged in that business in the city of Butte; that he kept his place of business open and transacted such business after 6 o'clock p. m. on January 7, 1902 (January 7, 1902, not being a day next preceding a holiday); that the defendant had a license to conduct such business from the city of Butte, and a like license from the authorities of Silver Bow county; that the city of Butte has not required any trades or avocations mentioned in Subdivision 16 of Section 4800 of the Political Code, as amended by Act of the Fifth legislative assembly approved March 8, 1897 (Sess. Laws 1897, p. 203), to close between 6 o'clock p. m. and 7 a. m. of the next day, except pawnbrokers, loan offices and secondhand stores, but that all other places of business, trades and professions in said city do close at 6 p. m. by consent, without being required to do so by ordinance. Upon this statement of facts, the district court found the defendant guilty, and adjudged that he pay a fine of \$50 and costs. From

this judgment, and an order denying him a new trial, defendant appeals.

Section 1 of Ordinance No. 586 reads as follows: "That hereafter it shall be unlawful for any person, persons or corporation to keep open or transact business with the public between the hours of six o'clock p. m. and seven o'clock a. m. of the following day and on legal holidays, in the operation of a pawn shop, loan office or secondhand store; provided, however, that on the next day preceding a legal holiday the hour of closing said place of business shall not be later than ten o'clock p. m." Section 2 provides a penalty for a violation of the ordinance, and Section 3 contains a repealing clause.

Both parties have proceeded upon the theory that Section 4800, above, as amended, is controlling in this instance, and we shall do likewise, as it is immaterial to the consideration of this case whether in fact it is, or whether the Act of the Third legislative assembly, approved March 7, 1893 (Sess. Laws 1893, p. 113), is in force. Subdivision 16 of Section 4800, above, as amended, reads as follows: "The city or town council has power: (16) To license, tax and regulate auctioneers, peddlers, pawnbrokers, secondhand and junk shops, drivers, porters, saloons, billiard tables, tenpin alleys, shooting galleries, shows, circuses, street parades, theatrical performances and places of amusements, within the city or town. * * *" Under the authority conferred by this section, the city enacted Ordinance No. 586.

Appellant contends that the ordinance is invalid for the reason that the city exceeded the authority delegated to it by Subdivision 16 of Section 4800 as amended, in the following particulars: (1) The ordinance prohibits the prosecution of his business; (2) it is an unlawful interference with or restraint of trade; and (3) under this ordinance he is denied the equal protection of the law.

1. Appellant contends that this ordinance prohibits him from conducting his business during a portion of every day, and that, under the power granted to the city to license, tax and regulate such business, it has no power to prohibit it altogether.

A regulation presupposes the existence of a right. "To regulate" means to adjust; to govern by rule; to direct or manage according to certain standards or laws; to subject to rules, restrictions or governing principles. (Standard Dictionary.)

But does the ordinance in fact operate as a "prohibition," as that term is used in the adjudicated cases? An examination of the authorities discloses that, where the term "prohibit" is used, it is in the sense of interdict; that is, to stop altogether. Most, if not all, police regulations do in fact operate as an interference with the free exercise of the classes of business made subject to them, but this interference alone cannot be made the test of their validity. If they afford reasonable facilities for the conduct of the business, they do not amount to a prohibition, but to a regulation, thereof. (*City of Jacksonville v. Ledwith*, 26 Fla. 163, 7 South. 885, 9 L. R. A. 69, 23 Am. St. Rep. 558; 1 Dillon on Mun. Corporations (4th Ed.), Sec. 400; *Ex parte Byrd*, 84 Ala. 17, 4 South. 397, 5 Am. St. Rep. 328.)

2. Appellant also contends that as he had a city and state license to conduct his business, and neither license imposed any limitation on the time within which he might conduct such business, the ordinance in question operates as an unlawful restraint of trade. But appellant's licenses were mere permits to conduct his business, and he took them charged with the knowledge that the city might impose any reasonable regulation for the conduct of that business which might be necessary to the peace and good order of the city. (*Smith & Lackey v. Mayor, etc. of Knoxville* (Tenn.), 3 Head, 245; *Horr & Bemis on Mun. Police Ordinances*, Sec. 132.)

3. Appellant makes particular complaint that only pawnbrokers, secondhand stores and loan offices, of all the classes of business enumerated in Subdivision 16, *supra*, are made subject to this ordinance, and that he is thus denied the equal protection of the law; but he does not say that any other pawnbroker is exempt from the operations of this ordinance. It is only where persons engaged in the same business are subjected to different restrictions, or are granted different privileges under like con-

ditions, that the discrimination is open to objection, or can be said to impair the equal right which all may claim under the law. (*Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923.)

The power conferred upon the city of Butte by Subdivision 16, above, is primarily to enact such police regulations with reference to the occupations therein enumerated as shall be necessary to the good order and general welfare of its citizens.

The only remaining question is, is the regulation provided by this ordinance a reasonable one? The mere fact that appellant's business is legitimate, and specifically recognized as such by legislative enactment, does not render ineffectual the power conferred by Subdivision 16 above. The police power is not confined to the regulation of those classes of business which are essentially illegal, for, if illegal, in the sense that they are prohibited by law, it is not easily understood how they could be regulated at all.

It is of the very essence of the exercise of police powers that citizens may, for the public good, be constrained in their conduct with reference to matters in themselves lawful and right. (*Hopper v. Stack*, 69 N. J. Law, 562, 56 Atl. 1.) It is not a material inquiry to attempt to ascertain the reason which impelled the legislature to designate the business of pawnbrokers as subject to police regulations. It is sufficient for us to know that it has done so, and deal with the law as we find it.

The fact that appellant cannot prosecute his business whenever he may desire to do so is hardly a sufficient reason for saying that the restrictions imposed are unreasonable. However comprehensive the terms "individual liberty," so frequently made use of, are, and however broad the claim which may be advanced that every one may employ his time in a lawful undertaking as may best serve his own interests, still the liberty referred to is a relative term, and, at most, means liberty regulated by just and impartial laws, while all sorts of reasonable restrictions are imposed upon the actions of men for the common

welfare and good of society. (*State v. Freeman*, 38 N. H. 426.)

However, the question of the reasonableness of the regulation is one of fact, of which the city council is the best judge, (*Staates v. Borough of Washington*, 44 N. J. Law, 605, 43 Am. Rep. 402; *City of Grand Rapids v. Braudy*, 105 Mich. 670, 64 N. W. 29, 32 L. R. A. 119, 55 Am. St. Rep. 472), and in the absence of a clear showing to the contrary, its reasonableness will be presumed. (*Ivins v. Inhabitants of Trenton*, 68 N. J. Law, 501, 53 Atl. 202.)

The express power to enact an ordinance of this character is conferred by Subdivision 16, above, and the legislature thereby indicated that it is safe to trust to the judgment and discretion of the common councils of our cities to determine to what extent the power conferred should be exercised; and there is every presumption to be indulged in this instance that the city council of Butte was actuated by pure motives, and that it was thoroughly familiar with the peculiar surrounding circumstances, with the defects of prior regulations, and with the particular evils to be remedied. In addition to this presumption, it is made to appear from the record that all other places of business close at 6 o'clock p. m., so that, after all, appellant is in no position to say that he is discriminated against in any sense. The ordinance permits him to conduct his business until 10 p. m. on every day next preceding a holiday, and, as more than sixty holidays are provided for by our Code (Political Code, Sec. 10), it is not apparent that the regulation is in any wise unreasonable.

In numerous instances like ordinances have been called in question, where the business affected was the proper subject of police regulation, and sustained as reasonable. (*State v. Welch*, 36 Conn. 215; *City of Bowling Green v. Carson* (Ky.), 10 Bush 64; *State v. Freeman*, *supra*; *Staates v. Borough of Washington*, 44 N. J. Law, 605, 43 Am. Rep. 402; *Soon Hing v. Crowley*, *supra*; *Barbier v. Connolly*, *supra*; *Smith & Lackey v. Mayor, etc. of Knoxville* (Tenn.), 3 Head, 245; *Ex parte Wolf*, 14 Neb. 24, 14 N. W. 660; *Maxwell v. Jonesboro* (Tenn.), 11 Heisk. 257.)

We are of the opinion that the authority to enact Ordinance No. 586 is specifically given by Subdivision 16 of Section 4800 above, as amended; that it is a police regulation, and, in the absence of clear proof to the contrary, it will be deemed reasonable.

The defendant was properly convicted, and the judgment and order denying his motion for a new trial are affirmed.

Affirmed.

HYNES, RESPONDENT, v. BARNES, APPELLANT.

(No. 1,772.)

(Submitted January 15, 1904. Decided February 26, 1904.)

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Claim and Delivery—Verdict—Judgment—Alternative—Correction—Appeal.

1. In a claim and delivery action the verdict of the jury need not be in the alternative.
2. The judgment in a claim and delivery action must be in the alternative.
3. The verdict must support the judgment, and both verdict and judgment must conform to the law.
4. The trial court has no authority,—after an appeal from a judgment in a claim and delivery action has been perfected, to correct the judgment by entering a judgment in the alternative.
5. A party in whose favor a judgment is rendered cannot, by failing to see that a proper judgment is entered, deprive his adversary of the right of appeal.

Appeal from District Court, Granite County; Welling Napton, Judge.

REPLEVIN by Annie M. Hynes against Frank E. Barnes, constable. From a judgment for plaintiff, defendant appeals. Remanded, with directions.

Mr. D. M. Durfee, Mr. N. W. McConnell, and Mr. Josiah Shull, for Appellant.

Mr. George A. Maywood, for Respondent.

MR. COMMISSIONER POORMAN prepared the following opinion for the court:

1. This is an appeal by the defendant from a judgment in favor of the plaintiff entered on a verdict in a claim and delivery action.

The judgment appealed from is a money judgment for the value of the property. Prior to the service and filing of the notice of appeal, plaintiff had filed a motion to amend the judgment. This motion, however, was not passed upon until subsequent to the perfection of the appeal, when an amended judgment was ordered entered. It is claimed by the appellant that the verdict is erroneous in not providing for the return of the property, that it is indefinite, and that it "is not in the alternative." The respondent contends that both the verdict and the original judgment are correct in form, and that, if the judgment was erroneous, it was the duty of the appellant to apply to the trial court for its correction.

The assignment of error relative to the alleged defects in the verdict is not referred to in the brief, except in the somewhat extended objection under the heading "Specifications of Error." No authorities are cited, nor have counsel given the court the benefit of their opinion as to why they think the verdict defective, further than the mere assignment of error. We have, however, examined this assignment, and find that the verdict is not open to the objections made. (Section 1103, Code of Civil Procedure; *Wheeler v. Jones*, 16 Mont. 87, 40 Pac. 77; *Etchepare v. Aguirre*, 91 Cal. 288, 27 Pac. 668, 25 Am. St. Rep. 180.)

2. The judgment appealed from, however, does not conform to the requirements of the statute. It is not in the alternative, as required by Section 1193, Code of Civil Procedure. The defendant is not given the option of returning the property. The entry of a judgment on a verdict is made the duty of the clerk by Section 1190, Code of Civil Procedure, which reads, in part, "When trial by jury has been had judgment must be entered by the clerk in conformity to the verdict;" and the

judgment so entered must also conform to said Section 1193. The entry of the judgment is the act of the clerk, but, when entered, becomes the judgment of the court.

In *Boley v. Griswold* (1874), 20 Wall. 486, 22 L. Ed. 375, appealed from the Montana territorial court (1872, 1 Mont. 545), the Supreme Court of the United States held that a judgment for the value of the property in a claim and delivery action was sufficient, without providing for the return thereof, when it appeared to the court that the property could not be returned; but this question was not presented to, nor passed upon by, the territorial court.

The gist of a claim and delivery action is the wrongful detention of the property. The demand is for the return of the property, or the payment of its value *if a return cannot be had*. Damages for the wrongful detention are incidental. The return of the property is the primary thing sought. The very nature of the action would seem to indicate an alternative judgment, and that is undoubtedly the meaning of the statute. The verdict must support the judgment, and both verdict and judgment must conform to the law. (*Etchepare v. Aguirre*, 91 Cal. 288, 27 Pac. 668, 25 Am. St. Rep. 180; *Cooke v. Aguirre*, 86 Cal. 479, 25 Pac. 5; *Dwight v. Enos*, 9 N. Y. 470; *Fitzhugh v. Wiman*, 9 N. Y. 559; *Berson v. Nunan*, 63 Cal. 550; *Stewart v. Taylor*, 68 Cal. 5, 8 Pac. 605; *Washburn v. Huntington*, 78 Cal. 573, 21 Pac. 305.)

3. Section 1724, Code of Civil Procedure, provides that an appeal is taken by filing a notice of appeal, and serving the same on the adverse party. This corrected judgment was not rendered nor entered until long after this appeal had been perfected. Section 1730, Code of Civil Procedure, provides that, where an appeal is perfected, it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein. The action of the trial court in attempting to correct this judgment was certainly a "proceeding in the court below upon the judgment," and a "matter embraced therein."

Under a similar statute the Supreme Court of California has repeatedly held that the trial court has no authority to take any proceedings whatsoever with respect to matters embraced in the appeal after the appeal is perfected.

“The trial court has no jurisdiction pending an appeal to allow an amendment to any pleading.” (*Kirby v. Superior Court*, 68 Cal. 604, 10 Pac. 119.) “An order of the court below amending a judgment after an appeal is taken is erroneous.” (*Bryan v. Berry*, 8 Cal. 130; *Shay v. Chicago Clock Co.*, 111 Cal. 549, 44 Pac. 237.) “The trial court has no power to so change the judgment appealed from as in effect to prevent the review of alleged errors brought up by bill of exceptions.” (*Reynolds v. Reynolds*, 67 Cal. 176, 7 Pac. 480.) “The superior court cannot deprive the supreme court of jurisdiction of an appeal from a judgment by amending it while the appeal is pending.” (*San Francisco Sav. Union v. Myers*, 72 Cal. 161, 13 Pac. 403.) “Pending an appeal from an order denying a motion for a new trial, the lower court has no authority to vacate or set aside the same.” (*Stewart v. Taylor*, 68 Cal. 5, 8 Pac. 605.) “Pending an appeal the court below so far loses jurisdiction of the cause that it cannot on its own motion set aside the judgment.” (*Peycke v. Keefe*, 114 Cal. 212, 46 Pac. 78; *Finlen v. Heinze*, 27 Mont. 107, 69 Pac. 829, 70 Pac. 517; *Finlen v. Heinze*, 28 Mont. 548, 569, 73 Pac. 123; *Bordeaux v. Bordeaux*, 29 Mont. 478, (decided February 1, 1904), 75 Pac. 359; *Glavin v. Lane*, 29 Mont. 228, 74 Pac. 406.)

The corrected judgment entered in this case on January 3, 1903, cannot, therefore, have any effect upon this appeal, nor be considered any further than as a mere fact appearing in the amended record.

4. The district court, prior to appeal, has the power to correct its judgments in certain particulars. (*Egan v. Egan*, 90 Cal. 15, 27 Pac. 22; *Etchepare v. Aguirre*, *supra*; *Stewart v. Taylor*, 68 Cal. 5, 8 Pac. 605.) But it is the primary duty of the party in whose favor a judgment is ordered to see that the proper judgment is entered; and if, by his inattention, an er-

erroneous judgment is entered, he cannot complain if the aggrieved party exercises his statutory right of appeal. It has been said: "If the judgment is objectionable in form, the remedy is by motion to correct in the court below, and an appeal may be taken from a denial of the motion, but an appeal without making such motion is not proper." (Black on Judgments (2d Ed.), par. 163; *Kindel v. Beck & P. L. Co.*, 19 Colo. 310, 35 Pac. 538, 24 L. R. A. 311.) This is, in effect, saying that there is no appeal from a judgment for an error which the trial court had authority to correct. In counties where the district court is in session but once in three months, and where the judge does not reside, great injustice might be done pending defendant's motion to have the plaintiff's erroneous judgment corrected; nor can the plaintiff, by keeping a motion on file to correct his judgment, deprive the defendant of his statutory right of appeal from the judgment, nor prevent him, on such appeal, from presenting to the appellate court any error appearing from the judgment roll. The right of appeal commenced with the entry of the judgment, and continued for one year. This right cannot be held in abeyance, nor the time shortened, except by some act or acquiescence of appellant.

We therefore recommend that this cause be remanded to the district court, with direction to modify the judgment so as to make the same conform to the provisions of Section 1193 of the Code of Civil Procedure, and that the judgment, when so modified, be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, this cause is remanded to the district court, with directions to modify the judgment so as to make the same conform to the requirements of Section 1193 of the Code of Civil Procedure, and that when so modified it be affirmed.

SMITH, RESPONDENT, v. SHOOK, APPELLANT.

(No. 1,794.)

(Submitted February 12, 1904. Decided February 26, 1904.)

New Trial—Newly Discovered Evidence—Diligence—Ignorance of Existence—Time for Filing Additional Affidavits—Witnesses—Cross-Examination—Propriety.

1. In an action to recover an alleged loan it appeared that plaintiff had been employed by defendant's firm, and had been paid a certain compensation, and that he had borrowed a sum of money from the firm, which he had afterwards repaid. Defendant sought to show by cross-examination of plaintiff's wife that plaintiff's statement of the amount received by him for the labor was not true, and that plaintiff had secured \$50 from defendant to send witness to Chicago, and at that time had no money. *Held* improper cross-examination.
2. Code of Civil Procedure, Section 1171, authorizes the granting of a new trial for newly discovered evidence, which the moving party could not with reasonable diligence have discovered and produced at the trial. In an action to recover a loan plaintiff testified in justice's court that no one was present when the loan was made, but in the district court testified that his wife was present. Defendant asked no continuance to secure impeaching witnesses, and made no effort to that end, but himself testified to the contradiction. *Held*, that a new trial was properly refused.
3. The party moving for a new trial on the ground of newly discovered evidence must show by his own affidavit that the new evidence was not known to him at the time of the trial, and the affidavits of other persons on that question are not sufficient.
4. Where it appears that nine affidavits relative to an alleged contradiction between the opposing party's testimony at a former and at the present trial were read in support of a motion for a new trial, it was not error to refuse to extend the time to enable the moving party to secure additional affidavits.

Appeal from District Court, Missoula County; F. C. Webster, Judge.

ACTION by Charles G. Smith against George L. Shook. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Mr. A. L. Duncan, for Appellant.

A new trial should have been granted on the ground of surprise, and also on the ground of newly discovered evidence.

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(Am. & Eng. Ency. Pl. & Pr. p. 742; *Phoenix v. Baldwin*, 14 Wend. 62; *Leavy v. Brown*, 2 Ark. 16; *Lockwood v. Rose*, 125 Ind. 588; *Oberlander v. Fixen & Co.*, 129 Cal. 690.)

Mr. John M. Evans, and *Messrs. Sanders & Sanders*, for Respondent.

The alleged facts do not in law constitute surprise, the appellant has been guilty of laches and his grounds are frivolous. If he was surprised he should have, then and there, during the progress of the trial, asked for delay, a continuance or a new trial. By continuing the case without so asking he waived any alleged surprise; he comes too late after verdict. (*Outcalt v. Johnston*, (Colo.) 49 Pac. 1058; *L. C. A. Hardware Co. v. Yankee*, (Colo.) 48 Pac. 1050; *Heath v. Scott*, (Cal.) 4 Pac. 557; *Bailey v. Richardson*, (Cal.) 5 Pac. 911; *Smith v. Smith*, (Cal.) 48 Pac. 730; *Beal v. Coddington*, (Kan.) 4 Pac. 180; *Knuffke v. "do."* (Kan.) 56 Pac. 326; *City of Argentine v. Simmons*, (Kan.) 52 Pac. 424; *Romero v. Desmarias*, (N. Mex.) 20 Pac. 787; *Pincus v. Puget Sound*, (Wash.) 50 Pac. 93; *Huster v. Wynn*, (Okla.) 58 Pac. 736; *Walker v. Gray*, (Ariz.) 57 Pac. 614.)

Where the respondent simply proves the allegations of his petition, the appellant cannot complain of surprise. (*Francisco v. Benepe*, (Mont.) 11 Pac. 637; *Martin v. Hill*, (Utah) 2 Pac. 62; *Rogers v. Marshall*, 13 Fed. 65.)

Appellant's so-called newly discovered evidence is nothing but cumulative evidence and impeaching evidence, and he seeks to impeach respondent and his wife on immaterial matters; courts do not grant new trials on such character of evidence. (*State v. Brooks*, 23 Mont. 146; *State v. Anderson*, 14 Mont. 541; *Baxter v. Hamilton*, 20 Mont. 327; *Leyson v. Davis*, 17 Mont. 220; *Chalmers v. Sheehy*, (Cal.) 64 Pac. 709; *Fist v. Fist*, (Colo.) 32 Pac. 719; *State v. Smith*, (Kan.) 11 Pac. 908; *Lee v. Birmingham*, 18 Pac. 219; *Denver Co. v. Simpson*, (Colo.) 41 Pac. 499; *Holland v. Huston*, (Mont.) 49 Pac. 390.)

There is ample and sufficient evidence to support the verdict and the judgment. To justify a reopening of this case by a new trial on the ground of newly discovered evidence, such evidence must of itself be sufficient to make it affirmatively appear probable that its introduction would change the result. It will not be opened to afford an opportunity to explore for further proofs. (*Kuhlman v. Burns*, (Cal.) 49 Pac. 585; *Munson v. The Mayor*, 11 Fed. 72; *Rand v. Kipp*, (Mont.) 69 Pac. 714; *Beals v. Cone*, (Colo.) 62 Pac. 948; *Huston v. Wynn*, (Okla.) 58 Pac. 736; *Hotchkiss v. Patterson*, (Kan.) 48 Pac. 435; *Baumgardner v. Huffman*, (Utah) 34 Pac. 294; *Turner v. Stevens*, (Utah) 30 Pac. 24; *Klopenstine v. Hayes*, (Utah) 57 Pac. 712.)

The contention that appellant should have been granted an extension of time in which to file additional affidavits is without any merit. There is not even a charge of abuse of discretion—that sound discretion which has all the presumptions in its favor and which will not be interfered with on appeal, especially where the refusal of the court is to grant a new trial on the grounds named. (*Oberlander v. Fixen Co.*, 129 Cal. 696; *Rand v. Kipp*, (Mont.) 69 Pac. 714; *Spottiswood v. Weir*, 22 Pac. 289; Code of Civil Proc. Sec. 1173, 1.)

Appellant's motion for extension was not filed until fourteen days after service of the notice of motion for new trial, whereas Section 1173, 1, Code of Civil Procedure, requires same to be filed and served within ten days after such notice, unless granted further extension by the court. Appellant is guilty of laches; he comes too late. (*Ogle v. Potter*, 24 Mont. 501; *Sullivan v. Helena*, 10 Mont. 134; *Power v. Lenoir*, 22 Mont. 169.)

MR. COMMISSIONER POORMAN prepared the following opinion for the court:

This action was commenced in the justice court to recover the sum of \$50 alleged to have been theretofore loaned by plaintiff to defendant. The defendant made general denial. Verdict

and judgment for plaintiff. Defendant appealed to the district court, where a trial again resulted in a verdict and judgment for the plaintiff. The defendant appeals from the judgment and from the order denying his motion for a new trial.

It appears from the record that the plaintiff and his wife had been employed by the firm of Shook & Hinchman, and had been paid a certain compensation; that plaintiff had borrowed a sum of money from the firm, which he had afterwards repaid. Plaintiff claims also that he had some money, derived from other sources, at the time he made the alleged loan to defendant.

1. At the trial the defendant sought to show by cross-examination of plaintiff's wife, Mrs. C. G. Smith, that plaintiff's statement of the amount of money received by him for the labor was not true; that plaintiff had secured \$50 from defendant for the purpose of sending witness to Chicago; that plaintiff at the time had no money. This evidence was objected to as improper cross-examination, and the objection was sustained. The defendant does not claim that *he* ever loaned the plaintiff any money. It is admitted by defendant that the money borrowed from the firm by plaintiff had been repaid prior to the commencement of this action. There was no dispute between plaintiff and defendant as to the amount received by plaintiff for labor performed for Shook & Hinchman, and the witness had not testified on direct examination as to any other money plaintiff had at any time. The court did not err in sustaining this objection.

2. It is also claimed that a new trial should have been granted on the ground of surprise and newly discovered evidence under Section 1171 of the Code of Civil Procedure, and that an extension of time should have been given appellant in which to file additional affidavits on his motion for a new trial. The showing of surprise and newly discovered evidence consists in the alleged fact made to appear that plaintiff had testified in the justice court that no one was present when this loan was made, while in the district court he testified that his wife was present; and that Mrs. C. G. Smith, after the trial, made state-

ments to the effect that she was not present at the time the loan was made, while in her testimony she had stated that she was present at that time. This newly discovered evidence in either case is no more than impeaching evidence, and that relating to plaintiff does not go to his testimony regarding the loan itself, but to the incidental fact as to who was present at that time. At the trial in the district court the defendant knew of the statements made by the plaintiff at the former trial, and knew in whose presence they were made, but no continuance was asked for, and apparently no effort then made to secure the evidence. The trial proceeded without any objection, and defendant testified on this very point. This impeaching evidence as to plaintiff then became cumulative. The defendant should have made some effort, when it first became known to him that this impeaching evidence was necessary, to have secured a continuance or permission to have these witnesses called. Objection after verdict, in such cases, comes too late. (*Heath v. Scott*, 65 Cal. 548, 4 Pac. 557; *Knuffke v. Knuffke*, 8 Kan. App. 857, 56 Pac. 326; *Pincus v. Puget S. B. Co.*, 18 Wash. 108, 50 Pac. 930; *Walker v. Gray*, (Ariz.) 57 Pac. 614; *Huster v. Wynn*, 8 Okl. 569, 58 Pac. 736; *Lee Clark A. H. Co. v. Yankee*, 9 Colo. App. 443, 48 Pac. 1050; *Rand v. Kipp*, 27 Mont. 138, 69 Pac. 714; *Romero v. Desmarais*, 4 N. Mex. 367, 20 Pac. 787.)

3. The defendant filed an affidavit in support of his motion for a new trial, but made no reference whatsoever to this newly discovered impeaching evidence as to the witness Mrs. C. G. Smith, nor did defendant offer any affidavits of the witnesses by whom he expected to make the proof, nor give any reasons why he did not make reference thereto or submit the affidavits, though it is stated in the affidavit of defendant's attorney that he knew the names of some of those witnesses. (*Elliott et al. v. Martin et al.*, 27 Mont. 519, 71 Pac. 756.)

It is fundamental that the moving party must show by his own affidavit that the new evidence was not known to him at the time of the trial. Upon that question the affidavits of other

persons are not, as a general rule, sufficient. (1 Spelling, New Trial & App. Prac. par. 207, and cases cited; Hayne, New Trial & App. par. 92; *Arnold v. Skaggs*, 35 Cal. 684.)

It is a general rule that, before a new trial will be granted on the ground of newly discovered evidence, cumulative or impeaching, it must be made to appear affirmatively that the new evidence would probably be sufficient to change the verdict and produce a different result. (Hayne, New Trial, par. 90; *Huster v. Wynn*, *supra*; *Leyson v. Davis*, 17 Mont. 220, 42 Pac. 755, 31 L. R. A. 429; *Springer v. Schultz*, 105 Ill. App. 544; *Francisco v. Benepe*, 6 Mont. 243, 11 Pac. 637. See, also, *Baxter v. Hamilton*, 20 Mont. 327, 51 Pac. 265; *State v. Brooks*, 23 Mont. 147, 57 Pac. 1038.)

Statutes similar to Section 1171 of our Code of Civil Procedure have been so construed. (*Oberlander v. Fixen & Co.*, 129 Cal. 690, 62 Pac. 254.)

“The additional evidence to afford opportunity for the introduction of which a new trial is sought, must be newly discovered, by which expression is meant that it must have been discovered since the trial. If discovered before or at the trial, and no continuance of the trial was applied for, an answer to the motion that no diligence is shown will be sufficient to defeat it, no matter what else may be shown.” (1 Spelling, New Trial, *supra*; *Curran v. A. H. Stange Co.*, 98 Wis. 598, 74 N. W. 377.)

It appears from the record that nine affidavits relative to the alleged statements made by plaintiff at the former trial were read and used in support of the motion for a new trial, and the court did not err in refusing to extend the time in order to enable the defendant to secure additional affidavits on that point, even if the application for such extension had been made within the time required by Section 1173, Code of Civil Procedure, as that section is construed in *Wright v. Mathews*, 28 Mont. 442, 72 Pac. 820, and *State ex rel. Stromberg-Mullins Co. v. Second Judicial District Court*, 28 Mont. 123, 72 Pac. 412.

We find no material error in this case, and recommend that the judgment and order appealed from be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order are affirmed.

BORDEAUX, RESPONDENT, v. BORDEAUX, APPELLANT.

(No. 1,787.)

(Submitted February 9, 1904. Decided February 26, 1904.)

Divorce—Desertion—Adultery—Condonation—Suit Money—Allowance—Abuse of Discretion—Recrimination—Trial by Court—Issues—Findings—Appeal—Implied Findings.

1. Where, in an action for divorce, plaintiff alleged that his wife had been guilty of desertion and adultery, which she denied, and, on her application for suit money and attorney's fees, it appeared that plaintiff had property of the value of \$69,000, and it was uncontradicted that a much larger sum than \$200 was necessary to enable defendant to properly prepare her defense, together with her cause of action for a divorce on the ground of desertion and extreme cruelty, alleged in a cross-bill, an order denying defendant's application for attorney's fees, and allowing only \$200 for suit money, was an abuse of discretion.
2. Where, in a suit for divorce on the ground of adultery, plaintiff's wife, by way of recrimination, alleged cruelty and desertion on the part of plaintiff, which he denied by replication, and the jury specifically found against defendant on all the issues in the case, but the court adopted only certain findings returned by the jury—all of which related to the adultery of defendant, and, of its own motion, set aside and refused to adopt all the further findings, and granted plaintiff a divorce, without making any express findings on the issues raised by defendant's answer,—the judgment, on appeal, will be reversed as not supported by the findings, notwithstanding the prevalence of the doctrine of implied findings.
3. *Held*, in an action for divorce on the ground of a wife's adultery, that where plaintiff's witnesses informed him of such adultery within two or three days after its occurrence, on December 23, 1897, and, notwithstanding such knowledge, he continued to live with defendant as his wife until January 23, 1898, occupying the same room with her, in which there was but one bed, etc., he thereby condoned her offense, and was not entitled to a divorce by reason thereof.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

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ACTION by John R. Bordeaux against Ella F. Bordeaux. From a judgment in favor of plaintiff, and from an order overruling a motion for a new trial, defendant appeals. Reversed.

Mr. Jesse B. Roote, Mr. William A. Clark, Jr., and Mr. John J. McHatton, for Appellant.

Mr. B. S. Thresher, Messrs. Stapleton & Stapleton, and Mr. Peter Breen, for Respondent.

As to the contention of the appellant, that the trial court erred in not making a special finding of fact as to all the allegations of the appellant's cross-bill, it is only necessary that we look for a minute into the record. Beginning with line 10 of page 711 of the record and running to line 10 of page 712 we find motions were made by both parties as to the findings, but nowhere do we find the motion; nor at any place in the statement or bill of exceptions do we find what findings were requested by the defendant and appellant. We simply find in the statement and bill of exceptions the findings adopted, but no request for findings, nor any rejected findings are to be found thereip. At line 3 of page 712 of the record we find the court using this language in connection with the adoption of findings, "and the court rejects the finding of cruelty of plaintiff to defendant and further adopts the general verdict of the jury for plaintiff and against the defendant." From this it would appear that a finding based upon the defendant's charge of cruelty was by the court rejected or found against the said defendant, but this court is left to speculate as to what such finding was. Nor does it appear at any place in the statement or bill of exceptions that the defendant requested a single finding upon any particular issue of fact. Sections 1114 and 1115, Code of Civil Procedure, definitely state the procedure to be followed in order to have a question of this kind reviewed by this court, and the mere fact that there appears to have been filed with the clerk of the trial court at some time a request for special findings by

the jury, and that the same has by said clerk been certified to this court is by no means a compliance with the provisions of the above sections. Nor can such be considered as part of the judgment roll. Section 1196, Code of Civil Procedure, gives the matters to constitute a judgment roll, and requests for findings are not mentioned. Besides this court has decided that such questions can only be considered when brought up in bill of exceptions or statement. (*Gallagher v. Cornelius*, 23 Mont. 27; *Yellowstone Nat'l Bank v. Gagnon*, 25 Mont. 271.) In the absence of a compliance with the requirements of the sections referred to, the presumption obtains that the court impliedly found for the prevailing party upon the issues of fact not covered by the express findings. Unless the party seeking a reversal has followed the course prescribed by Sections 1114 and 1115, the express findings are supplemented by implied findings. (*Yellowstone Nat'l Bank v. Gagnon*, *supra*.)

MR. COMMISSIONER CLAYBERG prepared the following opinion for the court:

Appeal from judgment and order overruling motion for new trial.

The action was commenced by John R. Bordeaux, as plaintiff, against Ella F. Bordeaux, as defendant, for a divorce on the ground of desertion, by filing a complaint on January 26, 1899. Defendant answered, denying all the material allegations, and, by way of "recrimination, defense, counterclaim and cross-complaint," set forth a claim for a divorce on the ground of desertion and extreme cruelty. To this answer plaintiff filed a replication denying all the material affirmative allegations. On February 25, 1899, plaintiff filed an amended complaint, in which was set forth desertion as one cause of action, and, as another, several specific, and many general, acts of adultery on the part of the defendant. Further reference to this first amended complaint is immaterial, because it was again amended as hereinafter set forth.

Defendant filed a demurrer to this amended complaint, which was sustained by "consent," and ten days allowed to file a further amended complaint.

On March 3, 1899, a second amended complaint was filed, which consisted of two causes of action: First, desertion; and, second, adultery. The specific adulterous acts set forth were that the defendant committed adultery with an unknown person on the 1st day of September, 1891, in the "Old Owsley Building;" also with Lyman A. Sisley on the 23d day of September, 1897, "at a house on the west side of Missoula Gulch, which was then in an unfinished condition, and is now numbered 825 West Broadway street, in Butte City;" also with Lyman A. Sisley on the 2d day of October, 1897, "on the west side of Missoula Gulch, in a new building, which was then in an unfinished condition, and is now numbered 825 West Park street, Butte City;" also with Lyman A. Sisley during the month of August, 1897, "in a lodging house on the east side of Main street, in Butte City, * * * known as and called the 'Red Boot Lodging House';" also on the 30th day of November, 1896, with Lyman A. Sisley, "in room number 27 in what was then, and is now, known as the 'Weyerhorst Block';" also with Lyman A. Sisley on or about the 25th day of November, 1897, at plaintiff's residence. This complaint contains some five or six other allegations, charging adultery generally, at different times and places, and with Lyman A. Sisley, or persons unknown.

Defendant demurred to this second amended complaint. This demurrer was overruled. Defendant then filed her answer, denying each and every material allegation of the complaint, and alleging, "by way of recrimination, defense, counterclaim and cross-bill," as a ground for divorce, first, the desertion of the defendant; second, his extreme cruelty. To the affirmative matter set forth in this answer, plaintiff filed a replication denying all the material allegations thereof. Upon these pleadings the cause came on for trial on the 16th day of August, 1901, before the court and a jury.

1. Suit Money and Attorney's Fees. The first error urged is based upon the action of the court in entering the order of August 17th on the hearing of defendant's application for attorney's fees and suit money. This application was filed on August 5th. The court made an order, returnable August 10th, requiring plaintiff to show cause why the application should not be granted. On this return day the court refused to hear the application, for the reason that the proper notice had not been entered in the motion book. On August 17th, the time the order was granted, the trial was proceeding. The court refused to consider the application as to attorney's fees, and refused to grant plaintiff any greater sum than \$200 for suit money. By the uncontradicted showing made upon this application, a much larger sum than \$200 appeared to be necessary to enable the defendant to properly prepare and present to the court her defense, and her own cause of action against the plaintiff, as alleged in her answer. The \$200 was allowed by the court "to pay witness fees for witnesses who might attend upon the trial in behalf of the defendant," and nothing was allowed to pay the other necessary expenses of properly preparing her case for trial, and presenting the same. The court refused to consider the application as to attorney's fees "until after the case had been tried and determined."

We are of the opinion that the court abused the discretion vested in it, in refusing to make a larger allowance for "suit money," and in refusing to consider the application as to attorney's fees. As said by the Supreme Court of California in the case of *Sharon v. Sharon*, 75 Cal. 1, 48, 16 Pac. 345, 366: "The discretion of the court is a *legal* discretion, to be reasonably exercised. 'Abuse of discretion' in making such orders does not necessarily imply a willful abuse or intentional wrong. In legal sense, discretion is abused whenever, in its exercise, a court exceeds the point of reason, all the circumstances before it being considered."

The defendant stood accused of various acts of adultery—one of the most heinous offenses that could be charged against

any woman of respectability. The dates of the offenses charged were, for the most part, some years prior to the trial of the suit. It was important, therefore, that the defendant investigate the facts in connection with these charges, ascertain the witnesses in her behalf, and generally to so prepare her case as to meet the charges made in the complaint, and prepare her case against the plaintiff for trial. From her showing, which, as said before, was uncontradicted, it appeared that she was without funds of any kind; and the court had already found, upon a former application for alimony, expenses, etc., that the plaintiff was possessed of property exceeding in value the sum of \$69,000. This order of the court was introduced as a part of plaintiff's showing on this application.

We are therefore satisfied that the allowance made was so grossly inadequate, under all the circumstances, that it was, in effect, a denial to her of the funds necessary to be expended in the proper preparation and presentation of her case to the court.

2. Recrimination. The complaint, as above stated, charged the defendant with two statutory grounds of divorce, viz., desertion and adultery. The answer denied the allegations of the complaint, and set up, "by way of recrimination," that the plaintiff was guilty of extreme cruelty and desertion—two other statutory grounds of divorce. The plaintiff filed a replication to this answer, thus raising issues upon its allegations. Plaintiff's cause of action on the ground of desertion was abandoned at the trial, but all the other issues were tried. The jury, in reply to requests for special findings submitted by the defendant, answered that the defendant did commit adultery, that the plaintiff was not guilty of extreme cruelty, and that he did not desert the defendant. In reply to special findings submitted by plaintiff, the jury found that defendant did commit some of the offenses of adultery charged. After the jury had rendered their verdict, written application was made to the court by plaintiff to adopt the findings of the jury, and by the defendant to disregard the findings returned against her, and to make other and further findings. The court adopted findings 1, 2, 3,

4, 5 and 7 returned in favor of plaintiff, all of which related to the adultery of defendant, and, at his request, made a further finding to the effect that plaintiff had been a resident of the state of Montana for five years last past. The court then, of its own motion, set aside and refused to adopt all the further findings of the jury.

Section 160 of the Civil Code provides that divorce must be denied upon a showing of recrimination.

Section 170 of the Civil Code defines "recrimination" as "a showing by the defendant of any cause of divorce against the plaintiff."

By Section 132 of the Civil Code, extreme cruelty and desertion are grounds of divorce.

As above stated, the answer set forth, "by way of recrimination," these two grounds of divorce as against the plaintiff. The jury found specially against defendant on both grounds. The court set aside these findings, and denied defendant's application to make findings on the other issues in the case. The conclusion resulting from this action of the court is apparent, viz., that no findings were made upon the recriminatory allegations in the answer. In such case the judgment cannot be maintained. These issues were material, and the findings must cover all matters at issue made by the pleadings. (*Cassidy v. Cassidy*, 63 Cal. 352.)

The above cited case is peculiarly in point. The action was by the husband for divorce. The wife denied the allegations of the complaint, and set up the defense of extreme cruelty. The court found that all the material allegations of plaintiff's complaint were true, and rendered judgment for the husband. No finding was made by the court upon the issues tendered by the wife as to cruelty. The court say: "It is well settled in this state that the findings must respond to all the material issues made by the pleadings;" (citing *Swift v. Canavan*, 52 Cal. 417; *Billings v. Everett*, 52 Cal. 661; *Phipps v. Harlan*, 53 Cal. 87.) That court held that the defendant may allege and prove facts

constituting cause of divorce against plaintiff in bar of the plaintiff's cause of action, and the averment of the facts constituting such recriminatory defense, and the denial thereof by plaintiff, create a material issue, upon which the court must find.

If these issues had been found in favor of defendant, plaintiff would not have been entitled to a divorce. (*Nagel v. Nagel*, 12 Mo. 53; *Church v. Church*, 16 R. I. 667, 19 Atl. 244, 7 L. R. A. 385; *Ribet v. Ribet*, 39 Ala. 348; *Pease v. Pease*, 72 Wis. 136, 39 N. W. 133; *Reading v. Reading*, (N. J. Ch.) 5 Atl. 721; *Conant v. Conant*, 10 Cal. 249, 70 Am. Dec. 717; *Estill v. Irvine*, 10 Mont. 509, 26 Pac. 1005.)

We are aware that the doctrine of implied findings prevails in this state, but such doctrine cannot apply to this case. The jury made special findings upon the issues raised by defendant's answer, and the court below set them aside on its own motion.

If any findings upon these issues are to be implied from the above stated facts, such findings would be contrary to those of the jury and in favor of the defendant, thus defeating the judgment for plaintiff.

Therefore, we must conclude that the judgment must be reversed on this ground.

3. Condonation. Section 160 of the Civil Code provides that a divorce must be denied upon a showing of condonation.

Section 163 of the same Code defines condonation as being "the conditional forgiveness of a matrimonial offense constituting a cause of divorce."

Section 164 provides: "The following requirements are necessary to condonation: (1) A knowledge on the part of the injured party of the facts constituting the cause of divorce. (2) Reconciliation and remission of the offense by the injured party. (3) Restoration of the offending party to all marital rights."

The verdict of the jury in this case finds the defendant guilty of adultery on the 23d day of December, 1897, and at other

dates prior thereto. The witnesses who testified to the adulterous act of December 23, 1897, testify that within two or three days after the occurrence of this act they informed plaintiff, who admits that he received such information. That he must have believed it is sufficiently evidenced by the fact that he called the same persons, as his witnesses upon the trial, to make proof of the allegations of the complaint. Yet he continued to live with the defendant until the 26th day of January, 1898, and occupied the same room with her, in which there was only one bed. He denies that he cohabited with his wife after the receipt of this information; but she, on the other hand, testifies that they did live together, and occupied the same room and bed. Another witness testified that he spent two nights at plaintiff's house, and during those two nights the plaintiff and defendant occupied the same room and bed. All the offenses found by the jury against the defendant occurred long prior to the time of the actual separation, and the record discloses that the plaintiff had full knowledge of the existence of the facts to which the witnesses would testify, and, with that knowledge, cohabited with the defendant until the 26th day of January, 1898.

Under these circumstances, and under the authorities, it is very clear that the plaintiff condoned the offenses of adultery which he had charged in his complaint, and therefore was not entitled to a decree of divorce. (*Marsh v. Marsh*, 13 N. J. Eq. 281; *Delliber v. Delliber*, 9 Conn. 233; *Turnbull v. Turnbull*, 23 Ark. 615; *Horne v. Horne*, 72 N. C. 530; *Farmer v. Farmer*, 86 Ala. 322, 5 South. 434; *Phillips v. Phillips*, 91 Ga. 551, 17 S. E. 633; *Todd v. Todd*, (N. J. Ch.) 37 Atl. 766; *Tilton v. Tilton*, 16 Ky. Law Rep. 538, 29 S. W. 290.)

In *Marsh v. Marsh*, *supra*, it is said: "Condonation may be implied if the husband, after reasonable knowledge of the infidelity of his wife, continues to admit her as the partner of his bed. Poynter on Mar. & Div. 232. * * * Reasonable knowledge may be said to have been had when information of a fact is given by credible persons, speaking of their own knowledge, particularly if the same facts be afterwards proved, and

they become instrumental in the proof. Poynter on Mar. & Div. 232; *Dobbyn v. Dobbyn*, *Ibid.* 233, note 'z.' "

The adultery charged in the complaint in the foregoing action was alleged to have been committed from March to July, 1857, and the act more especially relied upon was charged to have occurred the 23d day of March, 1857. The plaintiff was told all about this prior to July 4, 1857, by a witness whom he afterward put on the stand to prove it, and suit was commenced January 6, 1858, and, during all the time between receiving knowledge of the act and commencing the suit, plaintiff continued to cohabit with his wife as if nothing had occurred. They lived in the same room in a boarding house. The court, in regard to these facts, uses the following language: "It appears, then, as early as July 4, 1857, the petitioner had not only probable knowledge, but, if his witness is truthful, certain information, of his wife's guilt. He had the very information from the lips of the same witness upon which he asks this court to pronounce his wife guilty. He, at least, must be presumed to have deemed the witness credible (for he has placed her on the stand), to sustain his case."

In *Turnbull v. Turnbull*, *supra*, the court say: "He had the right to forgive her or not, as he saw fit, but, having once forgiven, it is not his privilege to retract his pardon, to subserve the purposes of his passion, his caprice, or his interest. He has passed an act of oblivion which heals all, and, in the eyes of the law, for all time to come."

In *Horne v. Horne*, *supra*, the Supreme Court of North Carolina uses the following vigorous language: "A husband who admits his wife to conjugal embraces after he knows that she has committed adultery is looked on as a disgraced man, 'a cuckold, a beast with horns,' "

In *Todd v. Todd*, *supra*, the court uses the following language: "If a man—a stranger—and a woman had occupied the same room and the same bed for a whole night, would any court accept his statement that he did not take off his clothes

as a refutation of the natural inference which would be drawn that the transactions between those people were such as would justify a belief in a connubial, or at least a copulative relation? But when this husband got into bed with that wife he got into bed with a woman whose person he had enjoyed. He felt entirely free to make any approaches to her that he might like, and obviously he was not repelled by the knowledge of her wrongdoing, else he would not have been there at all; so that he must be presumed to be a person who came to that degree of intimate relation with that woman on that occasion, not deterred by his knowledge of her previous unfaithfulness, else it is impossible to believe that he would have been in such a place with her. * * * A manly character would in all probability never have been found in the same house with the woman who had committed such an offense, save to denounce her; but this man was able to occupy not only the same house, but the same room and the same bed, with his unfaithful wife."

In *Tilton v. Tilton*, *supra*, Chief Justice Pryor says: "The judgment in this case against her, establishing a want of chastity, has taken from her a hitherto pure and spotless character, that took her, as a welcome guest, to her neighbors, that she might ply her needle from day to day, and enjoy the associations of the best and purest women of the village. The facts of this record show this proceeding by the husband to be a merciless assault upon women and virtue, and brand the appellant with infamy and disgrace, when it is apparent, even if the wife was guilty, that the husband sustained his relations with her with a full knowledge of what he claims to be the facts evidencing her guilt, and therefore the chancellor should have dismissed his petition."

We cannot refrain from saying that the record discloses in many instances a most reckless disregard for the truth on the part of some of plaintiff's witnesses, and also a character to some of plaintiff's witnesses which is not enviable, to say the least.

We have directly considered only three important errors upon which the case must be reversed. There are over 100 errors assigned in the brief of appellant, and, after an examination of all these errors and the record, we are of the opinion that a great majority of them are such that if considered would be sufficient to reverse the judgment and order appealed from, but inasmuch as they all pertain, either to the introduction or rejection of testimony, or matters of mere practice which may be avoided on another trial, and as the judgment and order must be reversed and a new trial granted, we do not deem it necessary to further refer to these various errors.

We advise that the judgment and order appealed from be reversed, and the case remanded for a new trial.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded.

Rehearing granted April 4, 1904.

CASES DETERMINED IN THE SUPREME COURT

AT THE
MARCH TERM, 1904.

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. GEORGE R. MILBURN,
THE HON. WILLIAM L. HOLLOWAY, } Associate Justices.

COMMISSIONERS:

HON. JOHN B. CLAYBERG,
HON. LEW. L. CALLAWAY,
HON. W. H. POORMAN.

NORD, APPELLANT, v. BOSTON & MONTANA CONSOLIDATED COPPER & SILVER MINING CO., RESPONDENT.

(No. 1,976.)

(Submitted February 12, 1904. Decided March 3, 1904.)

Master and Servant—Injuries to Servant—Safe Place—Assumption of Risk—Contributory Negligence — Evidence—Burden of Proof—Nonsuit—Appeal—Bill of Exceptions—Specification of Errors—Rules of Supreme Court—Briefs.

30	48
30	334
30	335
30	337

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31	146
32	40
32	75

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33	466

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36	107

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38	240
38	361
38	382

30	48
40	172

1. Supreme Court Rule X, Subdivision 3, does not require appellant to set out in his brief the reasons why he claims that the decision objected to is erroneous, and hence a specification that the court erred in sustaining defendant's motion for a nonsuit is sufficient without further statement.
2. A bill of exceptions need not contain a specification of errors of law relied upon.
3. Code of Civil Procedure, Section 1173, Subdivision 3, refers exclusively to a statement of the case, and has no reference to bills of exception.
4. Where plaintiff saved his exception to a ruling granting defendant's motion for a nonsuit, and settled his bill of exceptions containing the testimony and exception to the ruling of the court, such exception is all that is required to be shown by the bill in order to save plaintiff's right to urge that the court's ruling in granting the nonsuit was erroneous.
5. The question presented on a motion for a nonsuit is one of law.
6. A nonsuit should be granted only when the facts are undisputed and such that "all reasonable men must draw the same conclusions from them."
7. While, in an action for injuries to a servant, the burden is on the plaintiff to prove that defendant was negligent, and that the injury complained of was the direct or proximate result of the negligence alleged, the burden is on the defendant to show that plaintiff was guilty of such contributory negligence as would prevent his recovery, or that plaintiff assumed the risk of the employment.
8. Though the burden is on the master, in an action for injuries to his servant, to prove contributory negligence or assumption of risk, if the existence of such defense is disclosed by plaintiff's witnesses, defendant is entitled to the same advantage thereof as though proven on his part.
9. In an action for injuries to a servant, alleged to have resulted from the master's failure to provide a safe place for plaintiff to work, evidence reviewed, and *held* not to justify a nonsuit on the ground that it conclusively showed plaintiff to have been guilty of contributory negligence, or that plaintiff assumed the risk.
10. Where, in an action for injuries to a servant, the negligence alleged was defendant's failure to provide and maintain a reasonably safe place for plaintiff to work, and there was sufficient proof of such negligence to go to the jury, a variance relating merely to the details of the occurrence by which the injury was caused did not entitle defendant to a nonsuit.
11. Where, in an action for injuries to a servant, defendant moved for a nonsuit at the close of plaintiff's evidence, on the ground that the evidence conclusively showed that plaintiff was guilty of contributory negligence or that he assumed the risk, it could not be alleged for the first time on appeal that the nonsuit was properly granted by reason of an alleged variance between the pleading and proof.

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

ACTION by Nels Nord against the Boston & Montana Consolidated Copper & Silver Mining Company. From a judgment of nonsuit, plaintiff appeals. Reversed.

Mr. A. C. Gormley, and Messrs. Word & Word, for Appellant.

Mr. W. T. Pigott, and Mr. Ransom Cooper, for Respondent.

Section 89 of the Code of Civil Procedure, Compiled Statutes of 1887, required the denial of each allegation of the complaint to be made positively or according to the information and belief of the defendant. In *State ex rel. Milstead v. Butte City Water Co.*, 18 Mont. 199 (approved in *Rossiter v. Loeber*, *ib.* 372), this court held bad a denial couched in these words: "As to whether relator is a tenant in possession of the said premises, it has no knowledge or information upon which to found a belief, and therefore denies the same." The word "therefore" destroyed the effect of what would else have been a good denial. The principle of that case is applicable here.

The proximate cause of the injury was the act of the appellant himself. This appears from the complaint and also from the evidence. It likewise appears that such act created the presumption of negligence on appellant's part. In Montana the rule in such case is that the plaintiff must allege and (if denied) prove his freedom from negligence in doing the act. (*Kenyon v. Gilmer*, 4 Mont. 433; *Nelson v. City of Helena*, 16 Mont. 21; *Prosser v. Montana Central Ry. Co.*, 17 Mont. 372.)

The evidence was insufficient to prove that the cause of the accident was respondent's failure to exercise ordinary care in respect of appellant. Negligence is the gist of the action. Appellant's sole contention is that respondent omitted to discharge one of the absolute or positive duties which it owed to appellant. Failure to cover the bin and furnish light enough to enable appellant to see the supposed hand-hold, is the only wrong alleged. He cannot recover for negligence in any other respect. (*Pierce v. Ry. Co.*, 22 Mont. 448.) Was it guilty of a delict in the particular specified? Not unless the law imposed upon it an obligation in that regard. "An obligation is a legal duty by which a person is bound to do or not to do a certain thing," and arises either from contract or operation of law. (Section 1921, Code of Civil Procedure.)

The master is not the insurer of the safety, or reasonable safety, of the place. His full duty in that regard is discharged when he has used ordinary care to provide and maintain a rea-

sonably safe place. (*Kelley v. Fourth of July Mining Co.*, 16 Mont. 484, 497; *Spelman v. Gold Coin Mining Co.*, 26 Mont. 80; *Baugh Case*, 149 U. S. 368; *Hollenback v. Dingwell*, 16 Mont. 340.)

However unsafe the place may be, the master is not liable for injuries caused thereby without proof of his failure to use ordinary care. The fact of the accident and consequent injury is not, as between master and servant, any proof of negligence. The legal presumption is that the master has used ordinary care, and the presumption stands until rebutted and overcome by evidence showing the contrary. (*Nolan v. Montana Central Ry. Co.*, 25 Mont. 107.)

The master has the right to provide and maintain such a place as experience sanctions as reasonably safe. (*Wash. Ry. Co. v. McDade*, 135 U. S. 569; *Loftus v. Union Ferry Co.*, 84 N. Y. 455; *Hubbell v. Yonkers*, 104 N. Y. 434; *Carr v. Tunnel Co.*, (Mich.) 92 N. W. Rep. 110.)

There is no presumption that the master knows that a servant is inexperienced or cannot appreciate obvious risks (*Railroad v. Frawley*, 110 Ind. 18), and he need not specially provide for the safety of the careless. His duty does not extend so far as to require that he protect a servant against himself. (*Crafter v. Met. Ry. Co.*, 1 Common Pleas, 300.)

Appellant's negligence contributed directly to the injury of which he complains. (Wharton on Negligence, Sec. 46; *Cummings v. Helena & L. S. & R. Co.*, 26 Mont. 451; 7 Am. & Eng. Ency. of Law, 383; *Patterson v. Hemenway*, (Mass.) 19 N. E. 15; *McAndrews v. Railway Co.*, 15 Mont. 290; *Railway Co. v. Ives*, 144 U. S. 408; *Taylor v. Carew Mfg. Co.*, 140 Mass. 150; *Huddleston v. Lowell Machine Shops*, 106 Mass. 282; *Pingree v. Leyland*, 135 Mass. 398; *Sullivan v. Ind. Mfg. Co.*, 119 Mass. 396; *Coal Co. v. Jones*, 127 Ill. 379; *Pawling v. Hoskins*, 132 Pa. St. 617; *Michael v. Stanley*, 75 Md. 464.)

Appellant assumed the risk of injury. (7 Am. & Eng. Ency. of Law, 413; *Tuttle v. Milwaukee Railway*, 122 U. S. 189;

Johnson v. Railway Co., (Ore.) 31 Pac. 286; *Kelley v. Fourth of July Mining Co.*, 16 Mont. last paragraph on page 501; *McAndrews v. Railway Co.*, 15 Mont. 290; *Keen v. Detroit Co.*, 66 Mich. 277, 11 Am. St. Rep. 578; Wharton on Negligence, Sec. 214, page 195; *Cummings v. Helena & L. S. & R. Co.*, 26 Mont. 451; 20 Am. & Eng. Ency. of Law, 115-122, and cases cited; *Seymour v. Maddox*, 16 Ad. & El. (Q. B.) 326; *Ladd v. New Bedford*, 119 Mass. 412.)

When the dangerous condition is equally well known to, or alike open to the observation of, master and servant, both are upon common ground and the master is not liable for a resulting injury. (7 Am. & Eng. Ency. of Law, 1057, 1064, and cases; 20 *ib.* 119, and cases; *Taylor v. Carew Mfg. Co.*, 140 Mass. 150; *Kohn v. McNulta*, 147 U. S. 238; *Feeley v. Cordage Co.*, (Mass.) 37 N. E. Rep. 368; *Southern Pac. Ry. Co. v. Seeley*, 152 U. S. 145; *Gibson v. Erie Ry. Co.*, 63 N. Y. 449; *Murphy v. Rubber Co.*, (Mass.) 34 N. E. Rep. 268; *Tuttle v. Milwaukee Ry.*, 122 U. S. 189; *Michael v. Stanley*, 75 Md. 464; *Lunberg v. Glenwood Lumber Co.*, (Cal.) 49 L. R. A. 33; *Sweeney v. Envelope Co.*, 111 N. Y. 520; *Appel v. Ry. Co.*, 111 N. Y. 550; *Kraeft v. Meyer*, (Wis.) 65 N. W. Rep. 1032; *McMillan v. Spider Co.*, (Wis.) 60 L. R. A. 589; *Koepcke v. Wisconsin Bridge Co.*, (Wis.) 92 N. W. Rep. 558.)

A servant assumes the risk of injury caused by the negligence of a fellow servant. Nelson, the "straw" boss, was not a vice principal, but Nord's fellow servant. (*Hastings v. Montana Union Ry. Co.*, 18 Mont. 493; *Goodwell v. Montana Central Ry. Co.*, *ib.* 298; *Mulligan v. Montana Union Ry. Co.*, 19 Mont. 135; *Wastl v. Montana Union Ry. Co.*, 24 Mont. on page 169. These cases seem to overrule the *Berg Case*, 12 Mont. 212.)

The proximate cause having been the carelessness of a fellow servant, the appellant must fail even though the primary cause was respondent's wrong. (*Luman v. Mining Company*, (Cal.) 74 Pac. Rep. 30.) Manifestly the accident would not have hap-

pened but for Nelson's act. Again, if the accident was caused by Nelson's negligence in combination with Nord's, appellant was properly nonsuited.

The correct rule is "that the court should grant a nonsuit if, in view of all the evidence introduced by the plaintiff, it would grant a new trial if the jury should bring in a verdict in his favor" (*Garver v. Lynde*, 7 Mont. 108), and that there must be more than a mere scintilla of evidence to justify a verdict. (*Pierce v. Great Falls & Canada Ry. Co.*, 22 Mont. 445; *Patton v. Railway Co.*, 177 U. S. 658.)

MR. COMMISSIONER CLAYBERG prepared the following opinion for the court:

Appeal from a judgment of nonsuit. The action was for damages resulting from a personal injury caused by the alleged negligence of defendant in not using ordinary care to provide and maintain a reasonably safe place for plaintiff to work.

It appears from the record that defendant had constructed six ore bins, in a continuous line, for the purpose of receiving ore from loaded freight cars. Only three of these bins were at the time of the accident in actual use, and these were at the westerly end of the line. The next bin to those in actual use was full of ore, which had been placed therein prior to plaintiff's employment. Bins 5 and 6 (those farthest to the east) were empty, and about twenty-two feet in depth. Lengthwise, over this line of bins, two railway tracks had been constructed and maintained, over which cars containing ore were moved from the east to west, for the purpose of unloading in bins 1, 2 and 3. Two board walks were also constructed parallel to the railway tracks over all the bins—one about 2½ feet wide, between the two railway tracks, and another on the north side of the tracks. These walks seem to have been constructed for the accommodation of the men working there, as a means of passage. It was the duty of the men who unloaded the cars in bins 1, 2 and 3 to bring the loaded cars from the east, where they were

stored, to the place of unloading. For this purpose three men were usually employed; one to attend to the brake on the loaded car, one to uncouple the car from the others, and one to start the car with a pinch bar, if necessary. Bins 5 and 6 were not covered between the tracks; bin 4 was full of ore; the nearest light was about one hundred and twenty feet away from the place where the accident occurred, being suspended over the center of bin 3. Plaintiff was hired to unload ore, and do such other work connected therewith as was required of men in like employment. The injury complained of occurred about 2 o'clock a. m. Plaintiff had worked only ten shifts prior to that time, and had never before uncoupled cars. One Nelson, the "straw boss" who had charge of the men working on the shift, told plaintiff and one Morris to go with him after a loaded car. When they reached the car, Nelson mounted it on the end nearest to bin No. 3 to attend to the brake. Plaintiff, under Nelson's directions, passed along the car to uncouple it at the other end. He says he placed his left foot on the board walk between the tracks, his right foot on the timber rail or on the rail of the track, and reached over to uncouple the car, and fell in the bin, breaking his back. There was a little light between the tracks, but it was very dark between the cars.

At the conclusion of plaintiff's case defendant made a motion for nonsuit, which was sustained, and judgment entered for defendant. From the judgment this appeal is prosecuted.

1. Counsel for respondent first objects to the sufficiency of the third specification of error in appellant's brief, and insists, as the motion for nonsuit was based upon the proposition that the evidence given on the trial in behalf of plaintiff conclusively showed that plaintiff was guilty of contributory negligence, or had assumed the risk of the employment, as well as upon the proposition that plaintiff's proof did not tend to support the allegations of the complaint, that appellant could not be heard to attack the judgment of nonsuit on the ground that the testimony did not show contributory negligence or assumption of risk. This specification is as follows: "It was error in the court

to hold that the evidence was insufficient to go to the jury as tending to support the allegations of plaintiff's complaint. It was accordingly error to sustain the defendant's motion for nonsuit."

Respondent's objection is purely technical, and should only be sustained if no other conclusion can be reached. The error complained of is clearly as to the action of the court below in granting a nonsuit. Appellant's reasons why he claims the decision was error are immaterial, and are not required to be set forth by the rules of this court. They are therefore mere surplusage, and should not be considered. The provisions relied on are found in Rule X, Subd. 3, which, among other things, provides that the appellant's brief shall contain "a specification of errors relied upon, which shall be numbered and shall set out separately and particularly each error intended to be urged." There is no requirement that the specification shall set out appellant's reasons why he claims the decision is error. That is purely a matter of argument. It is sufficient under the provisions of this rule, therefore, to simply specify that the court below "committed error in granting the motion for nonsuit."

The rules of the court are not established for the purpose of befogging attorneys, and a reasonable interpretation of them, therefore, should obtain. The purpose of this subdivision of Rule X, above cited, is to require attorneys to specify and point out the errors of which they complain, and not to give their reasons why they complain it is error, and, if more than one error is charged, to number them and set them out separately and particularly.

Counsel for appellant at the hearing requested permission to amend specification of error No. 3, which was objected to by respondent on the ground that the specification in the brief should correspond with the specification of error in the bill of exceptions, and that the bill of exceptions could not be amended, *ergo* the brief could not. It seems that attorneys generally have fallen into the error that the statutes require a bill of exceptions to contain a specification of errors at law relied upon by the

parties settling the same. We are of the opinion that this is not required. None of the sections of the statutes providing for the settlement of bills of exception require that such bills shall contain specifications of errors at law. The statutes providing what the bill of exceptions shall contain, it is complete when it contains such matter, and therefore there can be no authority for requiring matters to be stated in the bill of exceptions which are not required by the statutes.

The error probably arose from the provisions of Section 1173 of the Code of Civil Procedure, which requires that in statements, "when the notice designates as the ground of the motion errors in law, occurring at the trial and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely." But an examination of this section shows that it only applies to statements, and has no reference to bills of exception. Subdivision 2 of this section refers to bills of exception. Subdivision 3, which contains the foregoing language, refers exclusively to a statement of the case settled on motion for a new trial. The California statutes are the same as ours, and that court has uniformly held the doctrine above announced. (*Reay v. Butler*, 69 Cal. 572, 11 Pac. 463; *Shadburne v. Daly*, 76 Cal. 355, 18 Pac. 403; *Hagman v. Williams*, 88 Cal. 146, 25 Pac. 1111; *Barfield v. South Side Irrigation Co.*, 111 Cal. 118, 43 Pac. 406; *Snell v. Payne*, 115 Cal. 218, 46 Pac. 1069.)

In this case motion for nonsuit was made and granted. Plaintiff below saved his exceptions, and settled his bill of exceptions containing the testimony and his exceptions to the ruling of the court. This exception is all the statute requires to be shown in the bill of exceptions to save his right to urge the error in this court.

2. Did the court err in granting the nonsuit? We shall preface our consideration of this question with a statement of some legal principles, and then apply such principles to the question in hand.

(1) The question presented on a motion of nonsuit is one of

law. (*Emerson v. Eldorado Ditch Co.*, 18 Mont. 247, 44 Pac. 969; *Donahue v. Gallavan*, 43 Cal. 573.)

(2) The following are generally questions of fact: (a) Whether the defendant was negligent. (b) Whether the injury complained of was the direct or proximate result of the negligence alleged. (c) Whether the plaintiff was guilty of such contributory negligence as will prevent his recovery. (d) Whether the plaintiff assumed the risk of the employment. The burden is always upon plaintiff to show the facts specified in "a" and "b." The burden in this case was upon defendant to show the facts specified in "c" and "d." The decisions of this court have settled the proposition that in a case of this character the burden is upon the defendant to allege and prove contributory negligence. (*Cummings v. Helena & Livingston S. & R. Co.*, 26 Mont. 434, 68 Pac. 852.) This court, in the case last cited, uses the following language: "In actions for personal injuries the absence of contributory negligence is not required to be pleaded or proved by the plaintiff, but its presence is a matter of defense. Such is the law in Montana. *Higley v. Gilmer*, 3 Mont. 90, 35 Am. Rep. 450; *Mulville v. Pac. Mutual Life Ins. Co.*, 19 Mont. 95, 47 Pac. 650. The contrary rule was announced in *Ryan v. Gilmer*, 2 Mont. 517, 25 Am. Rep. 744, but has been overturned by the cases cited and those referred to by the opinions therein. If, however, the complaint shows the proximate (or a proximate) cause of the injury to have been the act of the plaintiff, the complaint must also state his freedom from negligence in the doing of the act, otherwise the pleading is bad. *Kennon v. Gilmer*, 4 Mont. 433, 2 Pac. 21; and so, if the evidence in behalf of the plaintiff shows the injury to have been directly caused (either in whole or in part) by his act, the burden is immediately upon him to prove that he was exercising ordinary care at the time. *Nelson v. City of Helena*, 16 Mont. 21, 39 Pac. 905." This doctrine has been reannounced and reaffirmed in the case of *Ball v. Gussenhoven*, 29 Mont. 321, 74 Pac. 871. Of course, the existence of these defenses may be disclosed by

plaintiff's witnesses, and, if so disclosed, defendant can have the same advantage of them as if proven on his part.

(3) The rule of this court governing nonsuits is well stated in the case of *Cain v. Gold Mountain Mining Company*, 27 Mont. 529, 71 Pac. 1004, in the following language: "Upon a motion for a nonsuit, everything will be deemed to be proved which the evidence tends to prove. *State ex rel. Pigott v. Benton*, 13 Mont. 306, 34 Pac. 301; *Morse v. Granite County Commissioners*, 19 Mont. 450, 48 Pac. 745. The rule is well established 'that no cause should ever be withdrawn from the jury unless the conclusion from the facts necessarily follows, as a matter of law, that no recovery could be had upon any view which could reasonably be drawn from the facts which the evidence tends to establish.' *Great Northern Ry. Co. v. McLaughlin*, 17 C. C. A. 330, 70 Fed. 669." See, also, *Coleman v. Perry*, 28 Mont. 1, 72 Pac. 42; *Ball v. Gussenhoven*, 29 Mont. 321, 74 Pac. 871; *Michener v. Fransham*, 29 Mont. 240, 74 Pac. 448; *Gardner v. Mich. Central R. Co.*, 150 U. S. 349, 14 Sup. Ct. 140, 37 L. Ed. 1107; *Patton v. Southern Ry. Co.*, 82 Fed. 979, 27 C. C. A. 287. These questions, being generally questions of fact, only become questions of law where the facts are such that "all reasonable men must draw the same conclusions from them."

In *Patton v. Southern Ry. Co.*, *supra*, the court says: "It is difficult to mark with precision the exact line which separates the functions of the judge from the functions of the jury in actions of negligence; for this being a mixed question of law and fact, and the terms by which it is usually defined having a relative significance, the rule requiring judges to decide questions of law, and juries to decide questions of fact, is perplexed with subtleties when applied to the special circumstances of each particular case. When the facts are undisputed, and such that all reasonable minds must draw the same conclusion from them, it is clearly the duty of the judge to say, as matter of law, whether or not they make a case of actionable negligence; but such is the infirmity of the human mind, and such its idiosyn-

crasies, that minds equally honest may sometimes draw different conclusions from the same facts. In all such cases, and wherever the facts are in dispute, it is as clearly the duty of the judge to submit them to the jury; for the law holds that twelve impartial men, applying their separate and varied observations and experiences of everyday life to the decision of questions of fact, are more likely to reach a correct conclusion than a single judge; and this must be so, if the jury system is worthy to be preserved. The courts have long since abrogated the doctrine that a mere scintilla of evidence from which there might be a surmise of negligence is sufficient to carry a case to a jury, and have adopted the more reasonable rule that in all cases there is a preliminary question, which the judge must decide—whether, granting to the testimony all the probative force to which it is entitled, a jury can properly and justifiably infer negligence from the facts proved; for, while negligence is usually an inference from facts, it must be proved, and competent and sufficient evidence is as much required to prove it as to prove any other fact. The simplest definition of ‘negligence’ is absence of due care under the circumstances. This seems easy of comprehension, but, when one attempts to apply it to a particular case, the inherent vagueness of the terms ‘due care’ and ‘reasonable prudence’ becomes apparent; for there is no fixed and immutable standard by which to measure duty in the varying and diverse transactions and happenings of life, and what may be due care in one condition and relation is the want of it in another. A process of ratiocination, therefore, becomes necessary—comparison and deduction. When this comes into play, new difficulties arise from the distinctive individualities, peculiarities and anfractuosities of the human mind. Of all the reported cases wherein judges have granted nonsuits or directed verdicts in actions of negligence, there are few where other judges, equally conscientious, might not have discovered some fact which would be considered rightly capable of producing a different impression on other minds, and therefore properly cognizable by a jury. One clear thread seems to run through them all, and

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that is that in all actions founded on negligence, whenever the facts are in dispute or conflicting, or the credibility of witnesses is involved, or the preponderance of testimony, and wherever the facts admitted or not denied are such that fair-minded men might draw different inferences from them, it is a case for a jury; and a case should not be withdrawn from the jury unless the inferences from the facts are so plain as to be a legal conclusion."

We have carefully examined the testimony disclosed by the record, and cannot say that "the facts are such that all reasonable men must draw the same conclusions from them." Therefore we must conclude that the above stated questions in this case were questions of fact, and that the court erred in granting a nonsuit.

3. Counsel for respondent claim that appellant's own testimony conclusively shows that he either had full knowledge that bins 5 and 6 were open, empty and dangerous, or was charged with such knowledge from the fact that he passed over them frequently to and from his work. But appellant denies such knowledge, and this fact, taken in connection with other facts and circumstances disclosed in the evidence for plaintiff, is sufficient, we think, to go to the jury upon the question of plaintiff's knowledge or means of knowledge of the dangerous condition of the place of his employment.

4. It is also claimed that there was a variance between the allegations of the complaint and the proof. As before stated, the negligence charged was that defendant did not use ordinary care to provide and maintain a reasonably safe place for plaintiff to work. We think the proof of this negligence was sufficient to go to the jury. The variance claimed does not go to the showing of the negligence alleged, but merely to the details of the occurrence by which the injury was caused, and we cannot say that such variance entitled defendant to a nonsuit; besides, the motion for nonsuit was not based upon variance, and no new grounds can be advanced in this court.

Further reference to the many other propositions urged by respondent seems unnecessary. We advise that the judgment appealed from be reversed, and the case remanded for trial.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment is reversed, and the case remanded for trial.

Rehearing denied April 4, 1904.

McMILLAN ET AL., APPELLANTS, v. FRANK, RESPONDENT.

(No. 1,418.)

(Submitted February 10, 1904. Decided March 3, 1904.)

Mines—Contract—Lease—Suit by Adjoining Owner—Indemnity—Pleading—Amendment—Evidence — Instructions—Harmless Error.

1. It is not error to permit an amendment to an answer, during the progress of the trial, where the testimony necessary to support the amendment would have been admissible without it.
2. In an action by the lessees of a mining claim on an alleged agreement to pay them \$8,000 to indemnify them for expenses incurred in case the lessor should compromise an adjoining owner's suit for possession of a mine, or should sell the mining claim, the lessor's testimony that he sold the claim, together with other mining property, for \$2,500, was admissible.
3. Where the lessees of a mining claim showed that a suit against the lessor for possession of a mine in the claim was ordered dismissed as settled, the lessor's testimony that he knew nothing about a compromise of the suit, and did not know it was dismissed as settled, was admissible.
4. In an action against the lessor of a mining claim on an alleged agreement to indemnify the lessees for expense in working a mine thereon in case an adjoining owner's suit for possession of the mine should be compromised, or the claim sold, where the witnesses for the lessees, in the examination in chief, purported to give the entire conversation on which their claim of a contract was based, testimony in rebuttal as to whether the promises to indemnify the lessees were made dependent on finding that the apex of the mine in the lessor's claim was properly excluded.
5. Where a mine worked by lessees of a claim had its apex in an adjoining claim, the lessor was under no obligation to protect them against a suit of the adjoining owner for possession of the mine, and his promise to do so is not binding, unless supported by some other consideration than the covenants of the lease.

6. In an action against the lessor of a mining claim on an alleged agreement to indemnify the lessees for expenses incurred in case an adjoining owner's suit should be compromised, or the mining claim sold, any error in an instruction that the order of dismissal in the adjoining owner's suit was not final was harmless, where it was undisputed that the lessor sold the claim.
7. Where the evidence was conflicting as to whether there was a contract, the jury's finding is conclusive.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

ACTION by A. A. McMillan and others against H. L. Frank. From a judgment for defendant, and from an order overruling a motion for a new trial, plaintiffs appeal. Affirmed.

STATEMENT OF THE CASE.

The facts in this case, in so far as it is necessary to state them, are that in October, 1890, the respondent, Frank, leased to one Cusick, appellants' assignor, an undivided one-half interest in and to the Clark lode claim. The lease contained the usual covenant for quiet possession. In the month of June, 1891, the appellants discovered within the exterior boundaries of the Clark claim a large body of ore, and commenced to extract the same. On June 29th the Anaconda Mining Company, which then owned a claim adjoining the Clark, called the "Mountain," began an injunction suit against appellants and respondent; claiming that the ore body upon which the appellants were working was part of a vein which had its apex in the Mountain claim, and consequently was no part of the Clark. When the writ of injunction was served, the appellants and respondent had a conference, in which the situation was thoroughly discussed. Both believed that the ore body upon which the appellants were working was part of a vein which had its apex within the limits of the Clark claim. Respondent agreed with appellants that he would employ an attorney and defend the suit, and that he would exploit the Clark claim for the purpose of demonstrating that the apex in question was in fact within the boundaries of the Clark. The foregoing facts are undisputed. Appellants also alleged "that thereafter plaintiffs surrendered to defendant

the entire possession of said lode claim, and permitted defendant to use their tools and appliances with which they had been operating the said mine to make the said development work as aforesaid, and, in consideration of the matters and things above set out, and a surrender of the said lode claim, and of the use of the tools and appliances for the purpose of doing the said development work, the defendant then and there agreed that he would litigate said suit to a successful termination, and in such event, or in the event of his compromising said suit, or in the event of his selling his said undivided one-half interest in the said Clark lode claim to the said Anaconda Mining Company, he would then pay and reimburse plaintiffs for all the money and labor that they had expended and all costs and expenses that they had incurred in doing development work on the said Clark lode claim as aforesaid." They further alleged that respondent did afterward compromise the suit and sell his interest in the Clark claim to the Anaconda Mining Company, but did not repay or reimburse them for any of the expenditures made, labor done or materials furnished by them. All these allegations were fully denied by respondent. He denied that the ore body in question was a part of the Clark claim; alleged that the Anaconda Mining Company "claimed to be the owner of said vein by reason of its ownership of certain claims lying north of the said Clark lode claim, and that it also claimed that the said vein or body of ore had its apex in the vein so owned by the said company, or one of them, and that it did not have its apex in the Clark lode claim, and was not part of the latter;" alleged that the Anaconda Mining Company did not lay any claim or set up any title to the one undivided half part of the Clark claim leased by him to Cusick, or to any part of the Clark claim itself; denied that he claimed or asserted to appellants that the said vein or ore body was a part of the Clark claim, or that the apex of said vein or ore body was within the boundaries of the Clark claim; averred that he had no knowledge concerning these matters, and no information except such as was given and furnished to him by the appellants themselves. Under the statute in force at the time, the answer was deemed denied without reply.

At the trial, after appellants had closed their case in chief, the court, over appellants' objection, permitted respondent to amend his answer by adding thereto certain allegations, in which respondent, without admitting any contract between himself and appellants, averred that any and all stipulations, agreements, or transactions, if any, that may have been had between the parties relating to the matter alleged in the complaint, were "made, done and had upon the understanding and condition" that the vein in question should be shown to be a part of the Clark claim, and that it had its apex therein, and that it was not intended by the parties, or either of them, that respondent should pay anything to the appellants, or assume any liability towards them, in case the apex of the vein should be found to be in one of the claims of the Anaconda Mining Company, or outside the Clark claim; and averred, upon his information and belief, that the apex was found to be in the Mountain claim, belonging to the Anaconda Mining Company, and that the location of the Mountain claim was prior to that of the Clark.

Appellants did not attempt to show that the apex of the vein or ore body was in the Clark claim. They relied upon the contract alleged in their complaint. McGovern, one of the appellants, in relating a conversation with respondent, said, in part, "He told me he was going to fight that lawsuit right to a finish; was going to develop that lead, and show the Anaconda Company that the apex of that lead was in the Clark ground. Frank made the remark right there, in the presence of three of us, that he would pay us what we were out, in case it came to a settlement or compromise." Speaking of a conversation subsequent to the one just quoted, McGovern said: "He repeated just what he said that afternoon—that, if it ever came to a compromise with the Anaconda Company or anybody else, that we would get every dollar that we were out. I have given Frank's exact words about reimbursing us, as nearly as I can remember. Mr. Frank said he would sink a shaft right on his own ground, and show the Anaconda Company that it was his mine, and on his lead. He asked Mike Devine [one of the appellants] if he would take

charge of the development work, and he also asked for the privilege of using the shaft and tools to do this development work with. * * * Mr. McMillan and Mr. Frank and the other gentlemen present, who were not miners, all took our judgment as to what ground this lead belonged to. I told them all that I was satisfied that the lead belonged to the Clark ground, and I had nothing else to point different. I really did believe that statement at the time."

To sustain his answer, respondent introduced evidence tending to show that the apex of the ore body in question was in fact in the Mountain claim, belonging to the Anaconda Mining Company, and in his testimony denied that he had made any kind of a contract with the appellants in which he agreed to reimburse them for their time or money expended in developing the Clark lode, and discovering the ore body therein. He testified that he had expended about \$3,000 in an endeavor to show that the apex of the ore body was in the Clark lode, but without avail.

The jury found a verdict in favor of respondent. A motion for a new trial was made, which was denied, and appellants then perfected this appeal.

Messrs. McBride & McBride, and Mr. E. N. Harwood, for Appellants.

Defendant's amendment to his answer, made after plaintiffs had put in their evidence in chief, was and is inconsistent with the original answer. The original answer denied that defendant had made any contract or agreement with plaintiffs. The amendment, without admitting the existence of any contract or agreement between the plaintiffs and defendant, averred that any contract or agreement, if any made by plaintiffs and defendant, was conditional upon the finding of the apex of the ore body in question in the Clark lode claim. If the original answer was true, then the amendment was untrue; and, *vice versa*, if the proposed amendment was true, then the answer was untrue. A party to an action shall not be allowed to obtain

benefits from contradictory and inconsistent allegations, deliberately made by himself in his pleadings; our Civil Code does not contemplate any such thing. A thing cannot be true and untrue at the same time, and any pleading containing allegations made by the same party, both affirming and denying a particular thing, carries falsehood upon its face. (*Losch v. Pickett*, 12 Pac. 822-825; *Kennett v. Peters*, 37 Pac. 1001; *Seattle Nat'l Bank v. Carter*, 45 Pac. 331-336; *Hoffman v. Gallatin County*, 18 Mont. 224; *Dole v. Burleigh*, 1 Dak. 227-234; *Newell v. Myendorf*, 9 Mont. 262.)

Messrs. Stapleton & Stapleton, for Respondent.

MR. COMMISSIONER CALLAWAY prepared the statement of the case and the opinion for the court.

1. Appellants insist that the court erred in permitting respondent to amend his answer during the progress of the trial, and say the amendment was inconsistent with the original answer, and that it raised a new issue after appellants had put in their case in chief. We think the amendment simply accentuated the defense alleged in the original answer. Respondent leased the Clark claim with a covenant that the lessee should have the quiet and peaceable possession of the same, with the right to extract the ores and minerals therefrom. If the vein of which the ore body was a portion had its apex in the Mountain claim, and not in the Clark claim, then the ore body was not a part of the Clark, and was not included in appellants' lease. That the Mountain claim has extralateral rights is not controverted by appellants. The controversy between appellants and respondent, as shown by the complaint and answer, both before and after amendment, arose upon the hypothesis that the apex of the vein or ore body was within the Clark claim. We fail to see how the inconsistency alleged to exist in the answer after amendment prejudiced appellants' case in any way. We do not think any new issue was injected by the amendment.

The testimony necessary to support the amendment would have been admissible without it.

2. Appellants contend that the court erred in not striking out at their instance a statement made by respondent to the effect that he sold his interest in the Clark lode, together with an eighth interest in the Nettie lode, for \$2,500. We see no error in the court's ruling. The appellants based their action upon an alleged promise made by respondent to pay them over \$8,000 in case he should compromise the suit or sell the Clark claim. He testified that he actually did sell the Clark claim, together with an interest in another, for \$2,500. This was a circumstance for the jury to consider in arriving at its verdict.

3. Appellants showed by a journal entry of the district court dated May 16, 1894, that the suit brought by the Anaconda Mining Company had been ordered dismissed as settled. Respondent testified that he did not know anything about a compromise of the suit, and did not know it was dismissed as settled. Appellants moved to strike out this testimony as incompetent, on the ground that the action of a person in court through his attorney is his action, and the client is bound by it. The court overruled the objection. Its action in so doing was not wrong. The journal entry in question does not show that respondent or his attorney had anything to do with it. If respondent had not interposed an answer asking for affirmative relief—and there is no showing that any answer was filed—the Anaconda Mining Company had the right to dismiss the action, even against respondent's consent.

4. After respondent had closed his case, appellants called the witness McGovern to the stand, and asked him this question: "State whether or not Mr. Frank made the promises which you have testified to as to reimbursement of lessees for the labor and expenditures they made on the Clark lode, dependent upon the fact of his afterward discovering the apex of the ore body which the lessees discovered upon the Clark claim?"— This was objected to as not rebuttal testimony, for the reason that what took

place between the appellants and respondent had been fully gone into in the examination in chief of the same witness. The evidence offered was a mere repetition. This witness, as shown by the statement of facts, testified that he had given the exact language of respondent as to the promise of reimbursement. All of appellants' witnesses who testified concerning the conversations with Frank were examined minutely as to such conversations, both upon direct and cross-examination, and assumed to give all of the testimony which they remembered, in detail. The offered proof, therefore, was properly excluded.

5. Appellants urge that the court erred in giving instruction No. 9, in which the jury was told that respondent was under no legal obligation to protect appellants against the suit of the Anaconda Mining Company; that a promise on the part of respondent to protect the appellants or to pay them could not be binding unless based upon some consideration other than the covenants contained in the lease. This instruction was given upon the assumption that the apex of the ore body was within the Mountain claim. Had there been any controversy upon that point, it would have been error to so instruct the jury. That the apex was within the Mountain claim is undisputed. Appellants did not deny that such was the fact, either in their case in chief or in rebuttal. Respondent, on the other hand, produced much testimony to prove it. If, as we have suggested above, the ore body was not a part of the Clark claim, but was a part of the Mountain claim, neither respondent nor his lessees were entitled to it, and respondent was under no obligation to defend the suit brought by the Anaconda Mining Company. This matter was fully covered by instruction No. 16, which appellants have not attacked in their argument.

6. Appellants urge that it was error for the court to tell the jury, in instruction No. 20, that the minute order dismissing the action brought by the Anaconda Mining Company was not conclusive and did not amount to a final or absolute dismissal of the suit, because it was not followed by any other order or judgment. We regard this instruction as immaterial and harm-

less. Appellants had shown that the respondent sold the property in question to one Haggin on January 25, 1894, some months prior to the time the minute entry of dismissal was made, and that Haggin thereafter transferred it to the Anaconda Mining Company. Respondent himself testified that he sold it to Haggin. Whether the suit was technically dismissed did not matter. The facts were before the jury. Upon appellants' theory of the case, respondent was liable if he sold the Clark lode to any one.

7. Appellants take exception to a number of other instructions given to the jury, but, after giving due attention to their argument pertinent thereto, we do not find that they have pointed out any error therein.

8. On the question whether there was a contract or agreement between appellants and respondent with respect to the subject-matter of this action there was a substantial conflict of testimony. The jury found for respondent, and, under the settled rule, its finding thereon is conclusive.

For the foregoing reasons, we are of the opinion that the judgment and order should be affirmed.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

VAN HORN, RESPONDENT, v. HOLT ET AL., APPELLANTS. 30 69
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(No. 1,798.)

(Submitted March 1, 1904. Decided March 3, 1904.)

Action on Injunction Bond—Pleading—Complaint—Demurrer—Pleading Over—Waiver.

1. Objection to a complaint, raised by demurrer, that it does not state a cause of action, is not waived by pleading over.

2. The complaint on an injunction bond, conditioned for payment of damages suffered by reason of the injunction, if it be decided there was no right thereto, must allege a failure to pay.

Appeal from District Court, Custer County; C. H. Loud, Judge.

ACTION by C. W. Van Horn against John M. Holt and another. Judgment for plaintiff. Defendants appeal. Reversed.

Mr. George W. Myers, for Appellants.

Mr. T. J. Porter, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is an action on an injunction bond. E. C. Howard commenced an action in the district court against the respondent Van Horn, the only object of which was to secure an injunction restraining Van Horn from the commission of certain acts detailed in the complaint in that action. Howard executed an injunction bond in the sum of \$300, conditioned as required by law, with the appellants here as sureties. An injunction was issued and served. Van Horn appeared in the action, filed an answer denying the allegations of the complaint, and afterwards moved the court to dissolve the injunction. This motion was sustained, and the injunction dissolved. Thereupon Van Horn commenced this action against the sureties on the injunction bond to recover specific damages alleged to have been sustained by him by reason of the injunction. The complaint alleges the facts set forth above, and, in addition, contains the specific allegation of the items of damages, and prays judgment for \$177.50 and costs. To this complaint the defendants (appellants here) filed a general demurrer, alleging that the complaint does not state facts sufficient to constitute a cause of action. This demurrer was overruled, and defendants answered. The cause was tried to a jury, which returned a verdict in favor of

the plaintiff for \$152.50, and from the judgment entered for that amount and costs the defendants appealed.

Appellants contend that the complaint does not state facts sufficient to constitute a cause of action, and does not support the judgment entered. Respondent contends that, even conceding that the demurrer was well taken, it was waived by the defendants' pleading over and by the verdict, and cites *Francisco v. Benepe*, 6 Mont. 243, 11 Pac. 637, which he contends supports this doctrine. But an examination shows that the demurrer therein considered was a certain special demurrer, and on the soundness of that decision we make no comment. It is not anywhere held that the objection to a complaint on the ground that it does not state facts sufficient to constitute a cause of action is waived by pleading over, or that such defect in the complaint is cured by verdict. On the contrary, it has been held uniformly that such objection is not waived, but may be urged in this court for the first time. (*Territory ex rel. Blake v. Virginia Road Co.*, 2 Mont. 96; *Gillette v. Hibbard*, 3 Mont. 412; *Largey v. Sedman*, 3 Mont. 472; *Parker v. Bond*, 5 Mont. 1, 1 Pac. 209; *Foster v. Wilson*, 5 Mont. 53, 2 Pac. 310; *Milligan v. Savery*, 6 Mont. 129, 9 Pac. 894; *Quirk v. Clark*, 7 Mont. 231, 14 Pac. 669; *Whiteside v. Lebcher*, 7 Mont. 473, 17 Pac. 548.)

The particular objection urged against the complaint is that there is no allegation that the amount of damages claimed to have been suffered by the plaintiff has not been paid. The condition of the injunction bond is "that in case said injunction shall issue, the said plaintiff will pay to the said parties enjoined such damages not exceeding the sum of \$300 as such parties may sustain by reason of said injunction, if the said district court finally decide that the said plaintiff was not entitled thereto." This action is upon the bond, and plaintiff sets forth at length the damages which he suffered by reason of the injunction, but does not say that such damages have not been paid. The gist of the action—that which gives rise to the action—is the failure of Howard or his sureties (appellants here) to pay

such damages, or, in other words, the gist of the action is the breach of the contract; and, in the absence of an allegation of a failure to pay, there is no allegation of any breach whatever, and consequently nothing which can give rise to an action. This rule seems to be settled beyond controversy. (*Curtis v. Bachman*, 84 Cal. 216, 24 Pac. 379; same case on second appeal, 40 Pac. 801; *Barney v. Vigoreaux*, 92 Cal. 631, 28 Pac. 678; *Michael v. Thomas*, 27 Ind. 501; 4 Ency. P. & P. 937, 942; 5 Cyc. 826.)

The action is analogous to an action on commercial paper, where nonpayment must be alleged (8 Cyc. 136), or to an action on any other form of written contract where the breach must be averred (9 Cyc. 728). The complaint does not state a cause of action, and will not support the judgment.

We have considered the other errors assigned by appellants, but are of the opinion that there is no merit in any of them.

Respondent, in his brief, contends that the record is insufficient, in that it does not contain certain papers which he contends should be a part of the judgment roll. But there is nothing whatever in this record to indicate that any other papers than those included should be in the judgment roll, while the certificate of the clerk is to the effect that the record does in fact contain a copy of the judgment roll. Attention is also directed to the certificate of the clerk attached to the record; but, while it is inartificially drawn, we are of the opinion that it is sufficient to identify the papers constituting the record.

The judgment is reversed, and the cause remanded.

Reversed and remanded.

KINMAN, APPELLANT, v. SCHEUER, RESPONDENT.

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80	291

(No. 1,800.)

(Submitted March 1, 1904. Decided March 7, 1904.)

Action—Dismissal—Entry in Clerk's Register—Judgment of Dismissal—Appeal—Final Judgment—Special Order After Judgment.

1. Code of Civil Procedure, Section 1722, as amended by Session Laws 1899, p. 146, authorizes an appeal from a final judgment or from any special order made after final judgment. Section 1004 authorizes the dismissal of an action in certain cases, and declares that such dismissal is made by entry in the clerk's register. *Held*, that an entry noting the filing of an agreement to dismiss is not a dismissal from which an appeal can be taken.
2. Under Code of Civil Procedure, Section 1722, authorizing an appeal from any special order made after final judgment, an order overruling a motion to set aside a pretended judgment of dismissal, which was in fact not a dismissal within Section 1004, authorizing dismissal, is not appealable.
3. Under Code of Civil Procedure, Section 1722, authorizing appeals from final judgments and special orders made after final judgments, an appeal from an order denying a motion to adopt a general verdict and special findings and to set aside the special verdict in a suit in equity must be dismissed where the record shows no judgment of dismissal or other final judgment.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

ACTION by Charles E. Kinman, as guardian of Fred V. Scheuer, against Isabella Scheuer. From an alleged judgment of dismissal and certain special orders, plaintiff appeals. Appeals dismissed.

Messrs. Sanders & Sanders, Mr. J. M. Hinkle, and Mr. A. N. Wallace, for Appellant.

Messrs. Stapleton & Stapleton, and Mr. W. E. Le Blanc, for Respondent.

The entry of dismissal in clerk's register is sufficient under Section 1004 of the Code of Civil Procedure. No judgment of dismissal by the court was, or is, necessary when a written

stipulation of both parties is filed with clerk, and entry thereof is made. (*Snell et al. v. Dwight et al.*, 121 Mass. 348; *Merritt v. Campbell*, 47 Cal. 546.)

MR. COMMISSIONER CLAYBERG prepared the following opinion for the court:

Suit in equity. Three appeals are presented in this record—one from an alleged judgment of dismissal, one from an order refusing to vacate such judgment, and one from an order overruling plaintiff's motion to adopt the general verdict and special findings and set aside the special verdict of the jury.

The statutes determine in what instances appeals may be taken to this court. Section 1722, Code of Civil Procedure, as amended by Session Laws 1899, p. 146, provides: "(1) From a final judgment entered in an action or special proceeding commenced in a district court or brought into a district court from another court. (2) * * * From any special order made after final judgment. * * *". It thus appears that in cases of this class, an appeal can only be taken from a final judgment, or from special orders made after final judgment.

On appeal from a final judgment the record must contain a copy of the judgment roll (Section 1736, Code of Civil Procedure; *Featherman v. Granite County*, 28 Mont. 462, 72 Pac. 972.) The judgment roll must contain the final judgment. (Section 1196, Code of Civil Procedure.)

The record on this appeal does not contain any judgment, but, on the contrary, shows affirmatively that no judgment was ever rendered or entered, and that the case is still pending in the court below. The only showing made by the record as to the dismissal of this case is found in an entry of the clerk in the register of actions, viz.: "November 25, 1901. Agreement between Frederick V. Scheuer and Isabella Scheuer containing agreement to dismiss filed." This filing of itself was not a compliance with the provisions of Section 1004, Code of Civil Procedure, and was not sufficient to dismiss the action. It could

amount to nothing more than the filing of a præcipe for dismissal. It would not have the effect of dismissing the suit. The statute provides: "The dismissal mentioned in the first two subdivisions is made by entry in the clerk's register." This contemplates a formal entry of the dismissal by the clerk in his register, and not the mere filing of the stipulation upon which the dismissal is to be entered. Whether the proper entry by the clerk would have the effect of a judgment of dismissal is not before us, and is not considered or passed upon. There being no judgment of dismissal in the record, we conclude that the appeal from the pretended judgment must be dismissed.

There can be no special order after judgment until a judgment is rendered or entered. There being no judgment in the record, the appeal from the order overruling the motion to set aside the pretended judgment of dismissal must therefore be dismissed.

The appeal from the order overruling plaintiff's motion in regard to the verdict and findings is necessarily an appeal from an order before final judgment, because no other judgment than one of dismissal can be entered in an equity case where there are special findings of a jury, until the action of the court is had upon such findings, as to the basis of a judgment. We have seen that the record contains no judgment of dismissal, and it contains no other final judgment.

The action of the court on motion as to the findings and verdict of a jury can be reviewed, if erroneous, by this court upon appeal from the final judgment. This appeal must therefore also be dismissed.

We recommend that each and all of the appeals in the record be dismissed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the appeals, and each of them, are dismissed.

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39	378

MORIN, RESPONDENT, v. WELLS ET AL., DEFENDANTS;
MOSHNER, APPELLANT.

(No. 1,796.)

(Submitted February 13, 1904. Decided March 7, 1904.)

Justices of the Peace—Appeal—Bond—Sureties—Justification—Objection to Sureties—Consideration—Jurisdiction—Presumptions—Statutes.

1. Code of Civil Procedure, Section 1760, provides that an appeal from a justice is to be taken by filing a notice of appeal with the justice, and serving a copy on the adverse party. *Held* that, in the absence of any showing to the contrary, it is to be presumed that a notice filed with the justice was properly served.
2. Code of Civil Procedure, Section 1763, provides that an appeal from a justice's court to the district court is not effectual for any purpose unless an undertaking be filed, and that appellee may except to the sufficiency of the sureties on the undertaking, and unless they or other sureties justify within five days, the appeal must be regarded as if no undertaking had been given. *Held*, that an exception to the sureties does not divest the jurisdiction of the district court of the appeal; that the requirement of the statute concerning the justification of the sureties is directory, for appellee's benefit, and that he may waive his privilege of excepting to the sureties, or may except to the sureties and afterwards withdraw such exception; that the statute is mandatory only where the appellee insists that the sureties justify within five days.
3. Where appellee excepted to the sufficiency of the sureties, and they failed to justify within the statutory period, counsel for the parties had the right to stipulate for an extension of time within which the sureties might justify or a new undertaking be furnished.
4. The parties to an appeal from a justice stipulated for an extension of the time within which the sureties might justify after the time fixed by the statute for their justification had expired, and, within the time so stipulated for, defendant signed as a surety. Six months later, the appeal was dismissed. *Held*, that the signature of defendant was not without consideration; it being for the purpose of preventing the appeal from becoming ineffectual and it having, presumptively, operated to stay proceedings for several months.
5. Defendant's action in becoming a surety, when he did, was not contrary to a mandatory statute nor prohibited by public policy.
6. Statutes must be liberally construed to maintain the right of appeal.

Appeal from District Court, Fergus County; E. K. Cheadle, Judge.

ACTION by Oliver Morin against John Wells and others. From a judgment in favor of plaintiff, and from an order deny-

ing a motion for a new trial, defendant Frank Moshner appeals. Affirmed.

Mr. Rudolf Von Tobel, and Messrs. Walsh & Newman, for Appellant.

The notice of appeal from the justice's court, together with the undertaking on appeal, were filed within the period of thirty days after the judgment was rendered. In accordance with the provisions of Section 1763, Code of Civil Procedure, the respondent in that action excepted to the sufficiency of the sureties to said undertaking on the 9th day of October, 1900. Under the provisions of Section 1763 said sureties were required to justify within five days after such exception, to-wit, on or before the 14th day of October, 1900, and, upon failure so to do, under the provisions of said section, "the appeal must be regarded as if no such undertaking had been given." Neither those sureties, nor others, justified within the statutory time. On October 15, 1900, the day after the expiration of the time for the sureties to justify, the parties to the action in the justice's court entered into a stipulation by the terms of which it was attempted to extend the time for the justification of the sureties, or to furnish a new undertaking, and to revive the jurisdiction which had already been lost. There can be no dispute as to the fact that the jurisdiction of the appellate court to try the cause expired on the 14th day of October, 1900. After that date, appellant maintains, nothing could have been done by either party to confer jurisdiction or to revive the jurisdiction which had been lost. The California Code is identical with ours upon that point, and the courts of that state have construed the words, "must be regarded as if no such undertaking had been given," as synonymous with the words used in the first part of said Section 1763, viz.: "The appeal is not effectual for any purpose." (*McCracken v. Superior Court*, 86 Cal. 74; *Woods v. Superior Court*, 67 *id.* 115; *Coker v. Superior Court*, 58 Cal. 177; *McKeen v. Naughton*, 88 Cal. 462; *Roush v. Van Hagen*, 17 Cal. 121; *Wilson v. Davis*, 1 Mont. 98.)

Section 1763 of the Code of Civil Procedure provides that, if the sureties do not justify within five days, the appeal must be regarded as if no undertaking had been given. They did not justify in this case within the five days, and hence the appeal must be regarded as if no undertaking had been given. After the expiration of five days the appellant signed the bond. This was without legal force or effect, and did not revive the appeal. (*McDonald v. Paris*, 68 N. W. 737; *Smith v. Coffin*, 70 N. W. 636; *McKeen v. Naughton*, 26 Pac. 354; *Price v. Doan*, 60 Pac. 893.) The parties could not, by stipulation, extend the time or waive giving a bond. (*Brown v. C. M. & St. P. Ry. Co.*, 75 N. W. 198; *Erpenbach v. C. M. & St. P. Ry. Co.*, 76 N. W. 923; *Brown v. Brown*, 81 N. W. 627.) Nor can parties by consent confer jurisdiction on the district court on appeal from justice court. (*Santom v. Ballard*, 133 Mass. 464; *Henderson v. Benson*, 5 N. E. 314.) Cases in which it has been held that a party may waive that which is intended for his benefit are cases on appeal from the courts of record to the supreme court, but on appeal from a justice court a strict compliance with the statute is necessary to give the district court jurisdiction. The sureties having failed to justify within the time prescribed by law, under Section 1763, the appeal must be considered as if no undertaking had been given. The appellant's signing his name to the bond after that date did not revive the appeal, and did not have the effect of staying the execution. Hence, there was no consideration whatever given for the bond. "Where a bond on appeal has no validity as a statutory bond, a motion for judgment thereon should be denied, even if it could be shown to be supported by a consideration, and be good as a common law bond." (*Central Lumber & Mill Co. v. Center*, 40 Pac. 334; *Powers v. Chabot*, 28 Pac. 1070; *McCallion v. Hibernia Savings Society*, 33 Pac. 329; *Reavy v. Butler*, 50 Pac. 375; *In re Kennedy's Estate*, 62 Pac. 64.)

The fact that appellant did not issue execution cannot substitute a consideration. (*Powers v. Chabot*, 28 Pac. 1070.)

Messrs. Bickford & Bickford, and *Mr. F. W. Metler*, for Respondent.

MR. COMMISSIONER CALLAWAY prepared the following opinion for the court:

This is a suit on an undertaking on appeal. The district court entered judgment against the principal and sureties upon the undertaking. Defendant Moshner moved for a new trial, which was denied. From the judgment, and order denying his motion, he has appealed.

It appears that on September 12, 1900, respondent herein recovered a judgment in justice's court against defendant Ouellette in the sum of \$298.15. Desiring to appeal therefrom, Ouellette on October 8th filed notice and undertaking on appeal. The sureties thereon were defendants Wells and Berger. On the day following, October 9th, respondent excepted to the sufficiency of the sureties, requiring them to justify within five days. This they failed to do. On October 15th counsel for respondent and Ouellette entered into a written stipulation in which it was agreed that Ouellette "have until and including October 22, 1900, in which said sureties were to justify, or said appellant was to furnish a new bond on appeal." On October 22d the appellant herein, at the instance and request of Ouellette, signed the undertaking and justified. No objection is made that appellant's signing and justification were not within the purview of the stipulation. Thereafter, and on April 19, 1901, the appeal was dismissed by the district court, though for what cause the record does not show.

The question for decision is, did the district court rightly hold appellant liable upon the undertaking?

By Section 1760 of the Code of Civil Procedure it is laid down that "any party dissatisfied with a judgment rendered in a civil action in a police or justice's court, may appeal therefrom to the district court of the county, at any time within thirty days after the rendition of the judgment. The appeal is taken by filing a notice of appeal with the justice or judge, and serving a copy on the adverse party or his attorney." Section 1763, *id.*, prescribes that an appeal from a justice's court

is not effectual for any purpose unless an undertaking be filed, with two or more sureties, in a sum equal to twice the amount of the judgment, including costs, when the judgment is for the payment of money, and must be conditioned that the appellant will pay the amount of the judgment appealed from, and all costs, if the appeal be withdrawn or dismissed, or the amount of any judgment and all costs that may be recovered against him in the action in the district court. The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and, unless they or other sureties justify before the justice or judge within five days thereafter, upon notice to the adverse party, to the amount stated in their affidavits, the appeal must be regarded as if no such undertaking had been given.

The undertaking in this action substantially complies with the conditions of the statute. The notice of appeal and undertaking were filed with the justice within thirty days after the rendition of the judgment. Presumably, the notice was properly served. The district court therefore had jurisdiction of the appeal. We must not confound the jurisdiction which the court then had with what took place after respondent exercised his right to except to the sufficiency of the sureties. (*Carroll v. McGee*, 25 N. C. (3 Iredell's Law) 16.) While respondent could not divest the court of the jurisdiction given it by the appeal, yet he could render the appeal ineffectual in case he saw fit to insist upon his exceptions to the sufficiency of the sureties, provided that his objections be not obviated as prescribed by statute; that is, by a justification on part of the same or other sureties or by the giving of a new bond.

The appeal, then, was perfected, subject only to the action of respondent. The undertaking was filed and approved by the court. The statute requiring a justification is directory, and is for respondent's benefit. (*State ex rel. Reins v. Sixth Judicial District Court*, 22 Mont. 449, 57 Pac. 89, 145, 74 Am. St. Rep. 618.)

The respondent may waive his privilege of excepting to the

sureties, if he chooses. If he does waive it, no one else can object. So, too, as the statute is for his benefit, he may except to the sufficiency of the sureties, and afterwards withdraw such exceptions; in other words, he may forbear to pursue his advantage.

If the respondent insists that the sureties justify within five days, the statute is mandatory upon the appellant. The sureties must justify, or at least commence to justify, within the period of five days, or others must justify in their stead, or a new bond must be given, upon notice to respondent; otherwise the appeal becomes ineffectual for any purpose.

It will be readily perceived that more than five days might be required to complete the taking of testimony upon a justification. Doubtless such a hearing could be postponed from time to time to suit the convenience of the court, or of the parties upon their stipulation, or because of necessity, as if the justifying surety should be taken ill during the hearing. It is manifest that the statute does not contemplate that the period of five days shall always be deemed a hard and fast limitation. It must be subject to variation, *ex necessitate rei*. Statutes must be liberally construed to maintain the right of appeal. (*Payne v. Davis*, 2 Mont. 381.) This being true, it follows that counsel for appellant and respondent had the right to enter into the stipulation set forth in the record, and the same is binding upon them.

Appellant contends that there was no consideration for his signing. He signed the undertaking and justified within the time fixed in the stipulation. He did so at Ouellette's request. He knew, or should have known, the purpose for which he signed the undertaking, and the object it was intended to accomplish. (*Mueller v. Kelly*, 8 Colo. App. 527, 47 Pac. 72.) It was for the purpose of preventing the appeal from becoming ineffectual—for the purpose of maintaining it. Upon the foregoing facts, we think there was sufficient consideration for the undertaking sued on. It was signed "in consideration of the

appeal," and appellant bound himself to pay the amount of the judgment appealed from, and the costs which might be awarded against Ouellette on the appeal, or on a dismissal thereof. It may be that one of the other sureties justified, or that the undertaking was sufficient, in respondent's opinion, after appellant signed. As to that the record is silent. We cannot say that it was not in all respects sufficient after appellant became surety to it; but, whether that be so or not, the record shows that he signed it on the 22d day of October, and that the appeal was not dismissed until the 19th day of April following. The presumption is that appellant received the benefit of having a stay of proceedings between the last-mentioned dates.

In Elliott on Appellate Procedure, Section 357, it is said: "There is a disposition—and it is a commendable one—on the part of the courts to enforce bonds given in legal proceedings wherever it appears that the party whose duty it was to execute a bond has received benefit from the bond, although it may not be well executed, and although there may be some defect of a jurisdictional nature, but not of such a character as to completely deprive the tribunal of jurisdiction. Weight is attached—justly, as we believe—by the better-considered cases, to the fact that the bond has yielded the principal obligor beneficial consideration." (*Braithwaite v. Jordan*, 5 N. D. 196, 65 N. W. 701, 31 L. R. A. 238, and cases cited; *Stephens v. Miller*, 80 Ky. 47.)

The Supreme Court of California takes the view that, even if an appeal be not secured, this does not operate to render void the undertaking given as required by law to make it effectual, and says: "The sureties on such an undertaking agree to be liable if the appeal be dismissed, and, since the respondent must be at some expense to have even a void appeal disposed of, there is a consideration for the undertaking." (*In re Kennedy's Estate*, 129 Cal. 384, 62 Pac. 64.) We need not go to that extent in this case. As above observed, we think the consideration for this undertaking sufficient.

Appellant's becoming a surety when he did was not contrary

to a mandatory statute, nor was it prohibited by public policy. (*Abbott v. Williams*, 15 Colo. 512, 25 Pac. 450.) On the other hand, it was for a good purpose—to preserve to Ouellette his appeal, and to secure to respondent the payment of his judgment, or any that he might recover in the district court. It follows that appellant must discharge the obligation he has voluntarily imposed upon himself.

For the foregoing reasons, we are of opinion that the judgment and order should be affirmed.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

INDEPENDENT PUBLISHING COMPANY, APPELLANT,
v. COUNTY OF LEWIS AND CLARKE, RESPONDENT.

(No. 2,045.)

(Submitted March 5, 1904. Decided March 11, 1904.)

Counties—Expenses of Criminal Prosecutions—Briefs on Appeal—Liability of County.

1. A county is one of the civil divisions of the state for political and judicial purposes, created by the sovereign power of the state of its own will, without the consent of the people who inhabit it; it is quasi corporate in character, but has only such powers as are expressly provided by law or are necessarily implied by those expressed.
2. After a criminal case has been appealed to the supreme court, the duties of the county attorney therein and his power to contract expenses for the county cease, and the duty of the attorney general begins, and, there being no Code provision authorizing it, he has no power to contract on behalf of the county, and the county has no power lawfully to pay, expenses incurred in printing briefs filed on behalf of the state in the appeal.

Appeal from District Court, Lewis and Clarke County; J. M. Clements, Judge.

ACTION by the Independent Publishing Company against the county of Lewis and Clarke. From a judgment for defendant, plaintiff appeals. Affirmed.

Mr. F. W. Mettler, for Appellant.

Mr. Lincoln Working, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

A rule of this court requires briefs to be printed. (Rule X.) In the case of *State v. Brown* (heretofore determined), 29 Mont. 179, 74 Pac. 366, a brief was printed by the appellant herein at the request of the attorney general. The prosecution having arisen in Lewis and Clarke county, the appellant presented its bill to the board of county commissioners of that county for allowance and payment. The board rejected it as not being a county charge. Thereupon an appeal was taken to the district court. (Political Code, Sec. 4288.) In that court the parties filed an agreed statement of facts in substance as follows: The brief, which is the basis of the claim of appellant herein, was ordered by the attorney general of the state of Montana for use of the supreme court in the case of *State of Montana, Respondent, v. Wilton G. Brown, Appellant*, which was an appeal from a judgment of conviction in a criminal prosecution in the district court of Lewis and Clarke county, Montana, and said brief was ordered on behalf of the state, and filed in the supreme court in accordance with the rule of the court requiring the same. The district court thereupon rendered judgment thereon in favor of the county; hence this appeal.

The sole question for determination is this: Is a county liable for the expense of printing briefs filed on behalf of the state in this court in criminal cases arising within such county, when ordered by the attorney general?

All criminal charges must be preferred in the name of the state and prosecuted by its authority. (Constitution, Art. VIII, Sec. 27.) The county attorney is the public prosecutor, and it is his duty, among others, to attend the district court and conduct on behalf of the state all prosecutions for public offenses. (Political Code, Sec. 4450.) All expenses necessarily incurred by him in such cases arising in the county are a county charge. (Political Code, Sec. 4681, Subd. 3.) The attorney general is given supervisory power over him in all matters pertaining to his official duties, and when the public service requires it, or he is requested by the governor to do so, he must assist the county attorney of any county in the performance of his duties. (Political Code, Sec. 460.) When the emergency arises calling him to the assistance of the county attorney, he necessarily has the authority to do anything that the inferior officer may do, or, if the circumstances require it, undo what has already been done. (*State ex rel. Nolan v. Dist. Court*, 22 Mont. 25, 55 Pac. 916.) The connection of the county attorney with a criminal prosecution, however, ceases for the time being when it is removed to this court by appeal, and such connection is not renewed again unless the cause is remanded to the district court for further proceedings. The attorney general must appear in this court and prosecute or defend all causes to which the state is a party. (Political Code, Sec. 460), and this duty is exclusively his. So long as the cause is pending in the district court, all expenses are proper charges against the county. This includes fees and mileage of officers, when they are allowed, and of witnesses and jurors. Included also is the expense of keeping the defendant when in custody. (Political Code, Sec. 4681.)

A county is one of the civil divisions of the state for political and judicial purposes, created by the sovereign power of the state of its own will, without the consent of the people who inhabit it. (7 Am. & Eng. Ency. Law (2d Ed.) 900.) It is *quasi* corporate in character, but has only such powers as are expressly provided by law or are necessarily implied by those expressed.

(Political Code, Sec. 4190; *State ex rel. Lambert v. Coad*, 23 Mont. 131, 57 Pac. 1092.) The extent of its duties and the burdens of expense to be borne by it are to be measured by the same limitations. So far as the expenses of criminal prosecutions are necessarily incurred by the county attorney, he is by law the agent of the county. When his duties in that regard cease on removal of a cause to this court, his power to contract expense also ceases.

If the attorney general, then, has power to contract expense bills for which the county is chargeable, his authority must be found in the enumeration of his powers and duties, or else in the enumeration of matters which are proper charges against the county, and the burdens of government cast upon it under the statute. A careful examination of all the provisions of the law upon this subject does not disclose anywhere that the counties are chargeable with any expense touching a criminal prosecution after its removal to this court. Nor is there among the powers of the attorney general with reference to such prosecutions mention of any authority to charge any expense to a particular county. While he may supervise and assist the county attorney during the pendency of the prosecution in the district court, there is no longer anything to supervise, nor any inferior officer to assist, after the cause is removed to this court. It is then in his exclusive control; and in the absence of express authority, or authority necessarily implied, he may not charge the county with any expense incurred by him. Section 4681, *supra*, has reference only to the powers of the county attorney in this particular, and although in the supervision of the county attorney in that official's duties, or in giving such assistance as he may render in the performance of them, the attorney general might incur expense for which the county is chargeable, such power does not appertain to the performance of his duties at the capital. Moreover, a board of commissioners may not assume and pay charges which the law does not impose upon the particular county.

There was, therefore, with reference to the bill in controversy, no power to contract for the county, nor power in the county lawfully to pay. Hence the district court was correct in holding that the bill in question is not a county charge, no matter whether the attorney general presumed to contract for the county or not, and its judgment must, for this reason, be affirmed.

Much was said in the argument of counsel touching the question whether the bill is a proper charge against the state, payable out of the appropriation made for office and traveling expenses of the attorney general. This question is not before us, and is not decided. Judgment affirmed.

Affirmed.

MR. JUSTICE MILBURN: I concur. The state prosecutes and should pay all expense bills incurred by it, unless there be special provision of law charging them, or part of them, to the county in which the prosecution originates. The county must pay what the law expressly says shall be paid by it, and no more. There is not any statute requiring the county to pay bills incurred by the state on appeal.

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GEBO, APPELLANT, v. CLARKE FORK COAL MINING
COMPANY ET AL., RESPONDENTS.

(No. 1,816.)

(Submitted March 4, 1904. Decided March 11, 1904.)

*Public Lands -- Fraud in Obtaining Patent -- Patentee as
Trustee—Pleading—Patent—Presumption.*

1. A complaint, to hold the patentee of public land a trustee thereof for plaintiff, alleging merely that plaintiff made application to purchase it as coal land, filing a declaratory statement in the land office, and went into pos-

session and improved it; that defendant caused a forged relinquishment of plaintiff's rights to be filed in the land office, of which she did not know till five months after expiration of the time within which she might have made proof and payment, and that defendant then purchased the land, and a patent was issued to him—does not state a cause of action; it not showing that plaintiff did not also make a voluntary relinquishment, by failure to prosecute work on the land, or to make, or offer to make, seasonable proof and payment.

2. A patent itself is in the nature of an official declaration by that branch of the government to which the disposition of the public lands is intrusted that all the requirements preliminary to its issue have been complied with.
3. In the absence of any showing to the contrary, the presumption will be indulged that the officials of the land department had before them sufficient proof to justify the issuing of the patent to the patentee.

Appeal from District Court, Carbon County; Frank Henry, Judge.

ACTION by Ella D. Gebo against the Clarke Fork Coal Mining Company and another. Judgment for defendants. Plaintiff appeals. Affirmed.

STATEMENT OF THE CASE.

This is a suit in equity, the object of which is to have the defendants (respondents here) declared to be trustees and to hold certain coal lands in trust for the use and benefit of the plaintiff (appellant here).

The amended complaint alleges that on March 24, 1897, George Gebo and Ella D. Gebo in good faith made a joint application to purchase 319 acres of the public coal lands of the United States under the provisions of Section 2348, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1440); that an affidavit and declaratory statement were duly filed in the proper land office as required by law, and the rules and regulations of the interior department respecting the sale of coal lands; that applicants paid the filing fee, and received a receipt from the receiver of the United States land office, to which was appended a notice that applicants' filing would expire on May 20, 1898. The complaint contains averments showing that plaintiff was a citizen of the United States, possessed of the requisite qualifications to enter coal lands, but nothing whatever is said as to the

qualification of her co-applicant. The complaint also alleges that plaintiff went into possession of the land, and opened a coal mine thereon, and otherwise improved the property. It is then alleged that on August 31, 1897, a false and fraudulent writing purporting to have been signed and verified by appellant, and by the terms of which George Gebo and plaintiff relinquished to the United States all their right, title and interest in and to the land described in their application, was filed in the land office; that such false and forged relinquishment was procured and filed by and on behalf of S. W. Gebo, W. C. Strohm and Frederick H. Davis, to enable Alfred Thomas and F. B. Burchmore to enter and purchase said land for the use and benefit of Gebo, Strohm and Davis, and that, immediately after the filing of said forged relinquishment, Thomas and Burchmore did purchase the land in controversy; that thereafter, in December, 1897, they (Thomas and Burchmore) sold their interests to Davis and Strohm; that afterwards Strohm sold his interest to Davis, and Davis on September 20, 1898, sold the property to the Clarke Fork Coal Mining Company, taking a mortgage on the entire property to secure the purchase price, \$100,000; that a patent from the United States was duly issued to Thomas and Burchmore; that of the fraudulent acts mentioned all purchasers subsequent to Thomas and Burchmore had actual knowledge; that the mining company is insolvent; that on June 14, 1899, appellant made a written offer to pay to the mining company \$3,190.20, being one-half of the original purchase price of the property from the United States, and demanded that the company convey to her an undivided one-half interest therein; that, by reason of the fraudulent acts mentioned, the plaintiff was prevented from procuring from the United States legal title to the land in controversy. The complaint then alleges: "(18) The plaintiff first had knowledge of the fraudulent acts herein alleged on or about the 1st of November, 1898." The prayer of the complaint is that the company be declared to be a trustee for the use and benefit of the plaintiff to the extent of a one-half interest in the property; that it be compelled to con-

vey to her such interest; that it be compelled to account to her for the rents, issues and profits; that the defendant Davis be required to release his mortgage on said one-half interest; and that plaintiff have judgment for such sum as may be found due on an accounting, and for her costs. To this complaint defendants interposed a general demurrer, which was sustained by the court; and, plaintiff failing to plead further, judgment for costs was entered in favor of defendants, from which plaintiff appealed.

Mr. C. L. Merrill, for Appellant.

Mr. John A. Luce, for Respondents.

MR. JUSTICE HOLLOWAY, after stating the case, delivered the opinion of the court.

. The demurrer challenges the jurisdiction of the court, and the sufficiency of the allegations of the complaint to state a cause of action; but, as the last ground of the demurrer only is contended for by the respondents in this court, our examination is confined to that inquiry.

Appellant argues at length that this character of action is maintainable, and this is readily conceded by respondents, so that the only inquiry before us is, does the complaint state facts sufficient to constitute a cause of action, or bring the plaintiff within the rule applicable to such actions?

The rule is that if, as a matter of fact, the government was imposed upon, and by fraud or mistake issued a patent to some other person, when in truth the plaintiff was entitled to it, then, upon a proper showing, a court of equity will decree the patentee to be a trustee, and to hold the land in trust for the use and benefit of the party really entitled to it. (*Meyendorf v. Frohner*, 3 Mont. 282.) But what is a proper showing? The very foundation of the rule is that the patent was issued to another when plaintiff was justly entitled to it. Then the complaint must show such facts as that it will appear therefrom

that she has connected herself with the original source of title in the government, and that her rights are injuriously affected by the existence of the outstanding patent. She must show such equities in herself as will control the legal title in the defendants' hands. (*Power v. Sla*, 24 Mont. 243, 61 Pac. 468.) The filing of the so-called declaratory statement does not even withdraw the land from entry, but any number of filings may be made upon the same land successively. The only effect of the filing of such declaratory statements is to give to the applicants, in the order of their filings, preference rights to purchase the land, and that only for a period of fourteen months from the date of filing. In other words, such filing only initiates a right, which may be lost by relinquishment, by failure to prosecute work on the land in good faith, or by failure to make proof and payment within the fourteen months; and, in order to make out a cause of action, plaintiff must show, first, that she did not voluntarily relinquish her right so initiated, and, second, that she did in good faith prosecute work upon the land, and, within the time allowed by law, did make proof and payment for the land, or at least offer to do so. She must show affirmatively that upon her part she did, or offered to do, all that was necessary to be done in order to secure the patent, and upon the doing of which patent should have issued to her (*Bohall v. Dilla*, 114 U. S. 47, 5 Sup. Ct. 782, 29 L. Ed. 61); and these in addition to the facts necessary to be shown in order to entitle her to make the filing in the first instance. If, as a matter of fact, plaintiff had known of the filing of the so-called forged relinquishment before the expiration of the fourteen months, she might with some show of reason claim that it was unnecessary for her to offer to make proof or tender payment, upon the theory that the law will not require the doing of a vain thing; but, on the contrary, she shows affirmatively that she did not know of the existence of such relinquishment until more than five months after the expiration of the time within which she might have made proof and payment, and yet there is no allegation in the complaint that within the fourteen months, or at all, she ever

made any offer to prove up on the land or pay for it. The reason for the necessity of this allegation is apparent, for, if there was another valid filing made upon the same land subsequent to the plaintiff's, and prior to the expiration of such period—and there is no allegation that there was not—and such subsequent applicant had in good faith complied with the law, plaintiff's right to patent would have ceased absolutely on May 20, 1898, and thereafter she would have been a stranger to the title (Section 2350, Rev. St. U. S. [U. S. Comp. St. 1901, page 1441]), and unable to maintain this action at all. The complaint must negative the fact of plaintiff's voluntary relinquishment of her filing on the land. It is not enough to show an initiation of a valid claim, but she must show a valid, subsisting claim during the time allowed by law for finally merging such claim into patent. The mere allegation that a fraudulent relinquishment was filed by certain parties is not an allegation that plaintiff herself never voluntarily relinquished her claim. It is not enough for her to show that the patent should not have been issued to Thomas and Burchmore. (*Sparks v. Pierce*, 115 U. S. 408, 6 Sup. Ct. 102, 29 L. Ed. 428.) She must show affirmatively that it was the filing of the so-called fraudulent relinquishment alone which deceived or misled the officials of the government, if they were deceived or misled, who otherwise would have received her proof and payment for the land, and issued to her the patent therefor. (*Lee v. Johnson*, 116 U. S. 48, 6 Sup. Ct. 249, 29 L. Ed. 570.) And the reason for this rule is manifest, for the execution and delivery of the patent to Thomas and Burchmore were the final acts of the officials of the government in the transfer of its title to the land, and, as those acts could lawfully be performed only after certain steps had been taken, the patent itself is in the nature of an official declaration by that branch of the government to which the disposition of the public lands is intrusted that all the requirements preliminary to its issue have been complied with. (*Smelting Co. v. Kemp*, 104 U. S. 636, 26 L. Ed. 875.) In the absence of any showing to the contrary, the presumption will be

indulged that the officials of the land department had before them sufficient proof to justify the issuing of the patent to Thomas and Burchmore. (*Lee v. Johnson, supra.*)

Numerous other infirmities in the complaint have been pointed out, but the foregoing considerations are sufficient to demonstrate its insufficiency, and the correctness of the trial court's ruling.

The judgment is affirmed.

Affirmed.

STATE EX REL. COBBAN, RELATOR, v. DISTRICT COURT
OF THE SECOND JUDICIAL DIS-
TRICT ET AL., RESPONDENTS.

(No. 2,058.)

(Submitted March 11, 1904. Decided March 14, 1904.)

Appeal from Justice's Court.

1. Unless an appeal from a justice's court is taken within the time, and effectuated in accordance with the regulations, prescribed in the Code of Civil Procedure, the district court has no jurisdiction of the appeal, except to dismiss it.
2. The only appeal from a justice's court provided for by the Code of Civil procedure, is an appeal from a judgment, hence there is no appeal to the district court from an order made in a justice's court either before or after judgment.

WRIT of review on the relation of Kate L. Cobban against the district court of the Second judicial district, in and for Silver Bow county, and William Clancy, judge thereof. Orders annulled.

Mr. James E. Murray, for Relator.

Mr. John F. Davies, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Application for writ of review. On November 6, 1903, an action was brought in the justice's court of South Butte township, Silver Bow county, by Kate L. Cobban against one Gust Vogel, to recover from him the possession of certain premises in the city of Butte, and damages for the use and occupancy thereof. Summons was issued and returned, showing due service on the defendant. On November 13th, the appearance day, on motion of plaintiff, the default of the defendant was duly entered; he having failed to appear within the hour allowed by statute after the time named in the summons. Evidence was then introduced and judgment entered in favor of plaintiff, as prayed for in the complaint. On November 18th the defendant served upon counsel for the plaintiff, and filed with the justice, a notice that he would on November 23d move the court to set aside the judgment. At the time appointed the parties appeared. In support of the motion, counsel for defendant filed an affidavit of the defendant, stating that he had not been served with summons in the action, and therefore had no notice of its pendency. The hearing was then continued until December 15th. The plaintiff having in the meantime filed an affidavit of the officer who served the summons contradicting the statements in the affidavit of the defendant, the justice denied the motion. On December 24th the defendant served and filed his notice of appeal to the district court from the judgment and the order, and, having given the undertaking required to effectuate the appeal, procured a transcript of the proceedings to be filed in the district court. On February 20, 1904, the motion to set aside the default and judgment was submitted to the dis-

district court. At the same time the defendant submitted a verified answer, setting forth his defense and an affidavit of merits. These papers were intended to supplement the showing made in the justice's court. Upon consideration an order was made sustaining the motion, and the defendant was permitted to file the answer. On February 27th the plaintiff submitted a motion to dismiss the appeal on the grounds, among others, that the court had no jurisdiction of the action, in that the appeal from the judgment had not been taken within the time provided by the statute after the rendition thereof, and that no appeal lies from such an order. The motion was denied. Thereupon this application was made to have annulled the two orders mentioned.

The question for decision is, was the cause removed to the district court in conformity with the provision of the statute applicable, so as to confer jurisdiction? The right of appeal, though guarantied under the Constitution (Article VIII, Sec. 23), may be exercised only in obedience to the statutory regulations applicable. These regulations are found in Sections 1760 to 1764 of the Code of Civil Procedure. Section 1760 declares that an appeal may be taken from a judgment within thirty days after the rendition thereof by filing a notice and serving it on the adverse party or his attorney. The district court is without power to entertain the appeal, except to dismiss it, unless taken within the thirty days, and unless, further, it is effectuated under Sections 1763 and 1764. When these steps have been taken by the appellant, the justice must, upon payment of his fee, perform the duties enjoined upon him by Section 1762. Upon the perfection of the appeal the court has jurisdiction of the cause, and may grant the relief authorized by Section 1761. This section has to do only with the extent of the relief which may be granted by the district court. (*State ex rel. Shanahan v. Lindsay*, 22 Mont. 398, 56 Pac. 827.) It does not, in terms, nor by implication, allow an appeal to the district court from an order made in the justice's court, either

before or after judgment. The only appeal provided for is an appeal from the judgment (Section 1760). Thereupon, under the terms of Section 1761, the district court may grant such relief as is therein provided, and no more.

There being no appeal allowed from the order refusing to set aside the default and judgment in the justice's court, and the appeal from the judgment having been perfected after the lapse of thirty days from the rendition thereof, the district court was without jurisdiction to entertain it or to make any order in the cause. The result is that the two orders complained of were in excess of jurisdiction, and must be annulled. The district court should have sustained the motion to dismiss the appeal on the ground of want of jurisdiction.

The orders complained of are annulled.

80	96
30	198

30	96
37	514

30	96
40	587

STATE EX REL. BOSTON & MONTANA CONSOLIDATED
COPPER & SILVER MINING CO. ET AL., RELATORS,
v. DISTRICT COURT OF THE SECOND JU-
DICIAL DISTRICT ET AL., RESPONDENTS.

(No. 2,019.)

(Submitted January 4, 1904. Decided March 14, 1904.)

*Injunction — Trespass on Mining Property — Contempt Pro-
ceedings—Determination of Title—Evidence—Sufficiency.*

1. In a proceeding to punish for contempt in violating an injunction restraining defendants from working mining properties decreed to be the property of plaintiff, much of the evidence to show that the properties on which

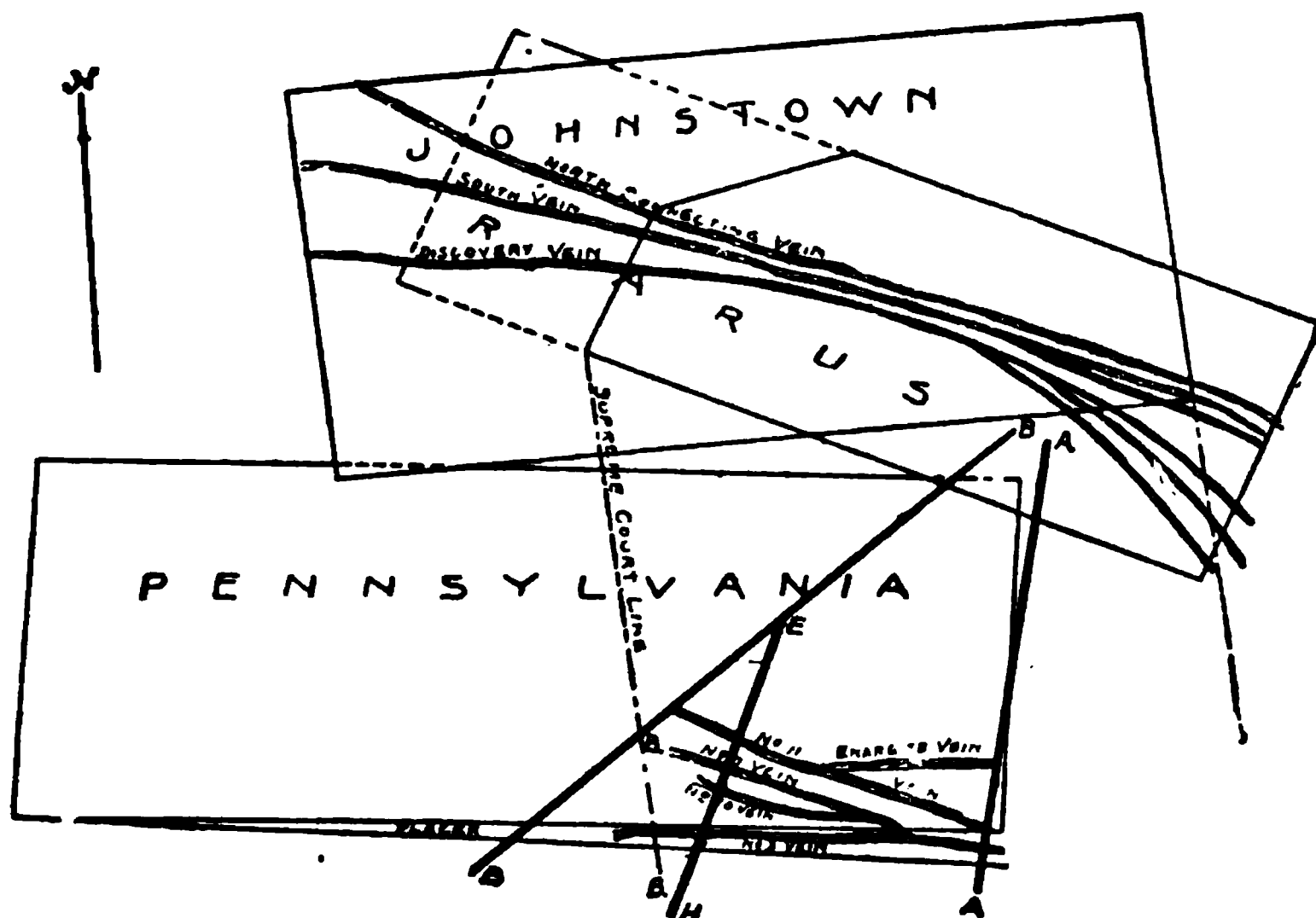
defendants worked belonged to plaintiff was speculative, and based on projections made on conclusions from facts observed in workings remote from the points in controversy. *Held* not sufficient to sustain a conviction.

2. Plaintiff in an action for an injunction to restrain trespass on a mining claim alleged that another cause of action, which was stricken from the complaint, was for damages for trespasses on veins lying south of the vein with reference to which injunction was sought, and the court found all the issues for plaintiff. On a subsequent proceeding to punish defendants for violation of the injunction the evidence showed that the veins with reference to which the injunction was alleged to have been disobeyed were the only ones south of the vein involved in the injunction suit. *Held*, that the title to these veins was not determined by the injunction suit.
3. Contempt proceedings for violation of an injunction restraining trespasses on mining property cannot be resorted to for the purpose of determining the title to veins, the ownership of which was not determined in the injunction suit.

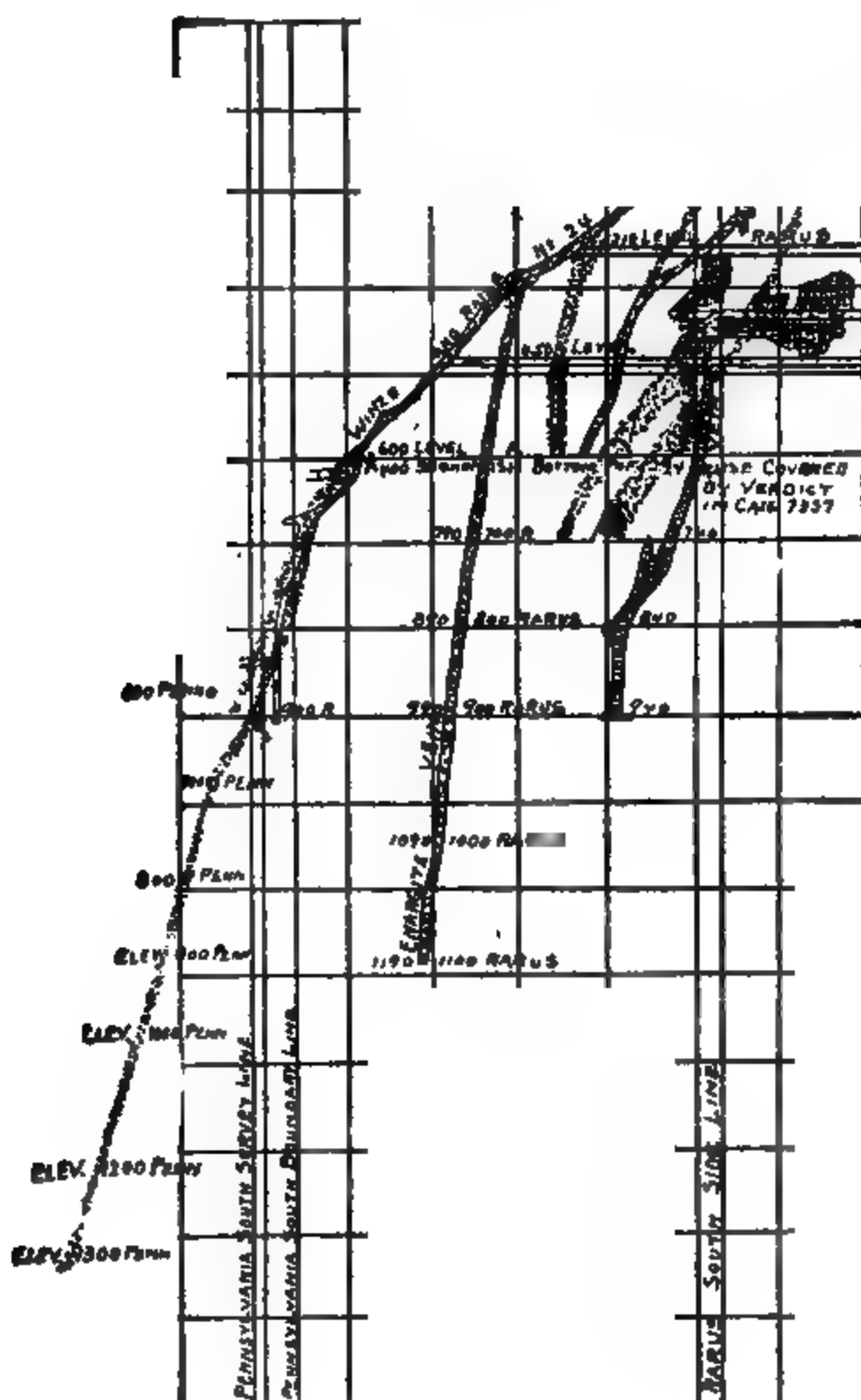
APPLICATION for a writ of supervisory control by the state, on the relation of the Boston & Montana Consolidated Copper & Silver Mining Company and others, against the district court of the Second judicial district of the state of Montana and the Hon. William Clancy, judge thereof, to vacate an order adjudging relators guilty of contempt. Order vacated.

The following are the diagrams referred to in the opinion:

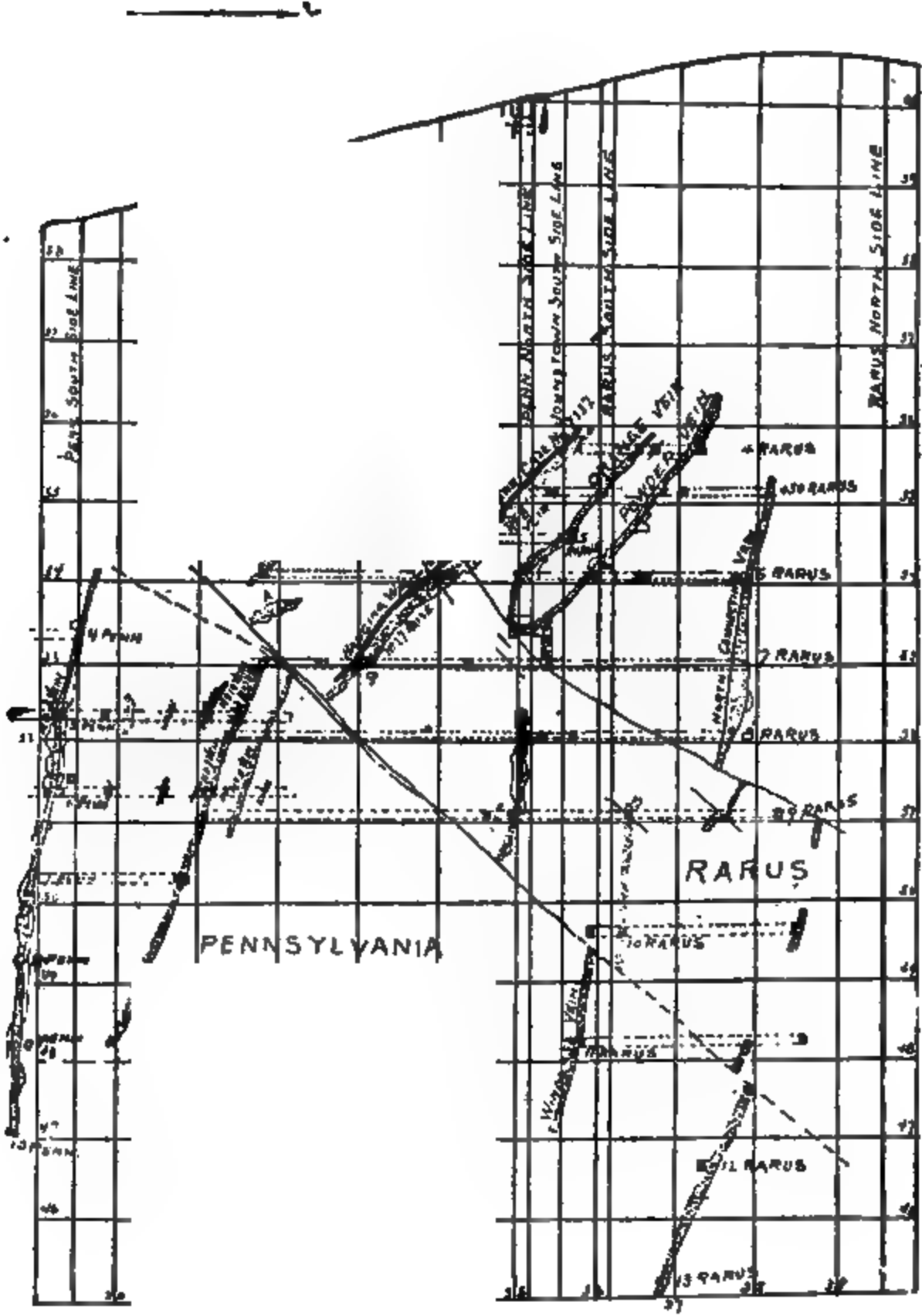
DIAGRAM 1.



SECTION A.



C.



STATEMENT OF THE CASE.

Application for writ of supervisory control. This proceeding was instituted for the purpose of having vacated an order of the district court of Silver Bow county adjudging the relators guilty of constructive contempt in violating the injunction contained in the decree in the cause entitled "*Montana Ore Pur. Co. v. Boston & Montana C. C. & S. M. Co.*," referred to in this proceeding as the "*Pennsylvania Case.*" That cause was heretofore before this court on appeal, and the decree entered by the district court in favor of the plaintiff was modified and affirmed. (27 Mont. 288, 70 Pac. 1114; 27 Mont. 536, 71 Pac. 1005.)

It is charged in the affidavit filed in the district court that the relator corporation and its co-relators, its agents, are or have been engaged in mining and removing ore from certain of the veins awarded by the decree in that case to the plaintiff. It is admitted that the relators, as principals and agents, have been removing ores from the veins, but that they are embraced in the decree is controverted.

The veins in controversy are known in the litigation between the corporations in the *Pennsylvania Case* as Nos. 3, 10 and 7 of the Pennsylvania lode claim, alleged by the plaintiff to be parts of the discovery vein of the Rarus-Johnstown claim upon its dip beneath the surface of the Pennsylvania. After a hearing in the district court all the relators were adjudged guilty, and were each sentenced to pay a fine of \$300.

The decree in the *Pennsylvania Case*, as modified by this court, describes the discovery vein of the Johnstown-Rarus claim as having its apex within the surface boundaries of that claim, as crossing both the parallel end lines thereof, and as being exposed on its dip to the south within and beneath the surface of the Pennsylvania claim on the 700-foot level of the Rarus in No. 10 winze, in raise 27 from the 700-foot level to the 400-foot level and above, and in upraise 24 from what is known as the 400-foot level of the Snohomish or 600-foot level of the Rarus to its apex in the plaintiff's ground. This vein and

the two lying to the north having their apices within the plaintiff's boundaries were adjudged to belong to the plaintiff to their lowest depths between parallel planes extending perpendicularly downward, one through the east end line of the Pennsylvania claim, and the other through the most westerly point of the conveyed portion of the Johnstown claim, and designated in the diagram accompanying the opinion on rehearing by this court as line "E Q." 27 Mont. 536, 71 Pac. 1005. The workings beneath the surface of the Pennsylvania and immediately to the south are very extensive. They are illustrated by numerous maps, sections and models submitted with the record in this case. To undertake to follow the witnesses who testified at the hearing by the aid of these maps, models, etc., through the 1,500 pages of evidence in the record, much of which was given by experts, and is extremely technical in character, and in this way to give a definite idea of the controversy, would be a hopeless task. For present purposes a sufficiently clear idea of it may be obtained from the accompanying diagrams illustrative of the contending claims.

Diagram 1 shows the position of the discovery vein in the Rarus and Johnstown ground at the surface. The veins in controversy are those indicated at the extreme southern portion of the diagram as veins 3, 10 and 7. The diagram shows approximately the position of these veins as they are illustrated in the testimony of the witnesses, at or near the 600-foot level of the Pennsylvania workings from the Pennsylvania shaft, which is located near the letter "B" at the end of the line B B in ground immediately south of the Pennsylvania claim. This level corresponds in depth substantially with level 900 of the Rarus workings from a shaft which is near the letter "A" in the Rarus ground at the north end of the line marked "A A." The vein marked "No. 11" is, according to plaintiff's contention, the discovery vein as it appears after passing over the enargite vein and in the levels above where it overtops 7 and 10, as hereafter pointed out. Its contention is, and in its evidence it attempted to show, that the discovery vein of the Rarus-Johnstown, on its

descent into the earth, has a flat dip not exceeding 45 to 50 degrees, and overtopping and cutting off the veins designated as "Enargite, Nos. 10 and 7," unites with No. 3 vein on the dip along a line beginning near the southeast corner of the Pennsylvania claim, and declining below the horizon toward the west at a very flat angle. It contends that veins No. 7 to No. 3, inclusive, also unite on the strike with the discovery vein near the southeast corner of the Pennsylvania claim, and thence pass out as one vein toward the east. This contention is illustrated approximately by Sections A and B B.

Section A is intended to represent a section of the country made by a plane passing perpendicularly downward along the heavy line A A on diagram 1, which follows substantially the direction of upraise 24 from the surface down to the 600-foot level of the Pennsylvania workings at the point Y. Upraise 24, called indifferently "Winze 24" and "Upraise 24," according to the plaintiff's contention, follows the discovery vein from the surface to the 600-foot level of the Pennsylvania. It is conceded that a short distance west of the plane of this section vein No. 3, or a branch of it, passes up beyond the line of union, and has its apex within the Pennsylvania surface boundaries. It has been extensively mined by the relator corporation by many levels below this line, and in ground to the south of the Pennsylvania, and for at least two levels above, all along from the line designated on diagram 1 as the "Supreme Court Line" to the point of union toward the east. It has a dip of 80 to 85 degrees, and, while it has not been followed from below into the Pennsylvania ground, the witnesses all agree that its apex will be found within the boundaries of that claim.

Section B B illustrates this condition in part, the short vertical vein passing upward from the 600-foot level in the Pennsylvania where the two veins actually unite on the dip being a portion of vein No. 3. This section was made along the broken line B B B (diagram 1), and through workings along that line. So, while it appears to be a plane section, it in fact distorts the

dip of the alleged overtopping vein, so as to make it appear much flatter than it really is. Besides, it has projected upon it, from the west, workings which extend along the direction of the line B B (diagram 1). Following on the plan, map and models the points of exposure of the discovery vein beneath the surface of the Pennsylvania claim as designated in the decree, they indicate that this passes across the Pennsylvania claim in the general direction of No. 11 vein, at an angle north, 60 to 70 degrees west. This condition the plaintiff seeks to conform to its theory of a union between this vein and No. 3 on the dip by testimony of witnesses—based partly, as it asserts, upon actual development of the vein at various points below the points mentioned in the decree, and partly upon projections through undeveloped ground—that, as the vein descends into the earth, the dip becomes much flatter. To illustrate: The witnesses testify that the vein has been developed by workings along the line B B in territory between the fault fissures to the west, as shown in Section C. These are projected to the east upon Section B B, and with reference to them some of the witnesses express the opinion that, if the vein extends from crosscut 754 (Section B B) on the dip it appears to have in these workings, it will intercept No. 3 vein in the Pennsylvania workings. The portion of the vein extending from this crosscut downward is projected through undeveloped country.

Section C is designed to represent the conditions along the line marked "Supreme Court Line" on diagram 1. It illustrates the contention of the relators. On this section the hanging wall of the discovery vein of the Rarus-Johnstown, as fixed in the decree, is designated "Hanging Wall." This is intended to show the dip of the vein along that line, just as 24 raise is intended to show it on Section A. The other points mentioned in the decree along the strike of the vein between these limits indicate the course of the strike of the vein across the Pennsylvania claim at the depth to which development had been made at the date of the decree. The lines passing diagonally across the face of

the section, and from left to right, apparently cutting the veins, indicate two parallel fault fissures descending through the Pennsylvania ground toward the northwest at an angle of about 50 degrees below the horizon. These are supposed to reach the surface near the east end line of the Pennsylvania.

The contention of the relators is that Nos. 10, 7 and 3 veins are distinct and separate to the west of the point of union, having their tops or apices within the Pennsylvania surface, and ending against the fault fissures toward the west, and coming to the surface toward the extreme eastern portion of the claim. They contend that No. 11 is a separate and distinct vein from the discovery vein; that it cuts off on dip and strike all other veins that come in contact with it; that it is parallel on its strike and dip throughout with No. 7; that the latter, on its strike toward the east, unites with Nos. 10 and 3, and passes out into the territory toward the east from 20 to 25 feet south of No. 11 (diagram 1); that No. 11 also passes out in the same direction, not coming in contact anywhere with No. 7 or 10, either on the dip or strike; that it has a dip of about 80 degrees; that the discovery vein on its dip overtops the enargite vein, and, passing down behind No. 11 to about the 400-foot level of the Snohomish, or the 600 of the Rarus, is there cut off by No. 11, and does not again appear in the lower workings; and that No. 11 should appear upon Section A as extending upward from the Snohomish 400-foot level. It is further contended that this vein is different in many of its characteristics from any of the other veins in the vicinity, in that it is between parallel clay seams, is exceedingly uniform in both dip and strike, has been developed both above and below the point of union with the discovery vein, and by its peculiar characteristics is readily recognized and traced. It is said that the union between vein No. 11 and the discovery vein is clearly indicated by the difference in dip of the two, as well as by actual development in the ground. It is further claimed that vein No. 7 is separated from vein No. 11 by country rock varying in thickness from 25 to 40 feet, entirely free from mineralization of any kind. Upon these facts is

founded the further contention that none of the veins in controversy were, or could have been, within the issues determined by the decree in the *Pennsylvania Case*.

Mr. A. J. Shores, Mr. C. F. Kelly, and Messrs. Forbis & Evans, for Relator.

Mr. J. M. Denny, for Respondents.

MR. CHIEF JUSTICE BRANTLY, after stating the case, delivered the opinion of the court.

It is apparent from the foregoing statement of the contentions of the parties as to the physical facts touching the situation of the veins in controversy that there is a wide difference between them as to their relative rights. If the plaintiff's contention be sustained, then veins 7 and 10 certainly belong to it, and the relators were properly convicted, whatever conclusion might be reached as to the ownership of vein No. 3 below the alleged union on the dip between it and the discovery vein. On the other hand, if the relator corporation be upheld in its claim, veins 3, 7 and 10 belong to it, and the judgment of conviction may not stand.

It is not proper for this court in this proceeding to analyze the evidence touching the question of ownership, or to express any opinion thereon. The theory upon which the plaintiff proceeded, and in which it was sustained in the district court, is that the decree in the *Pennsylvania Case* embraced these veins, though it does not specifically describe them, because developments made subsequent to its rendition demonstrate that they are parts of the veins specifically described. As to veins 7 and 10, and the portion of 3 eastward of where it unites with the discovery vein on the strike, the plaintiff says the facts are conclusive. To determine the correctness of this claim requires an examination of the issues involved in that cause, and an ascertainment of what falls within the description contained in

the decree. We have set forth in the statement the substance of the description. It does not extend, in terms, to any other vein or veins involved in the controversy than the discovery vein and those which appear to the north. It designates only certain points along the dip and strike of the former, and declares the plaintiff to be the owner of it to the depths. It does not refer to any vein or veins to the south, nor, though it has incorporated in it the findings of fact made by the court, does it refer indirectly to any such veins. This would not matter if the evidence tended merely to show trespass by the defendant corporation upon the same vein or veins at lower depths. Subsequent developments, however, tend to show conditions which could not have been contemplated by the parties or the court at the time the decree was rendered. For illustration: No. 3 vein is not mentioned in the decree, yet the facts adduced at the hearing tend to show that it has its apex in the southern part of the Pennsylvania claim. To determine its ownership would require, upon proper issues, a determination of the question where the apex actually is, as well as the fact of the union between it and the discovery vein, and also the relative priorities of the dates of the Pennsylvania and Johnstown-Rarus locations. This determination would also require a consideration and determination of the fact whether or not the alleged overtopping vein is identical with the discovery vein, for upon a determination of these and other facts would depend the ownership of the united vein. There would be involved, also, an inquiry whether the defendant corporation has extralateral rights upon No. 3 vein. If there is in fact no union between these veins, then the defendant corporation is without question the owner of No. 3 vein. If there is a union of them on their strike toward the east, and they become one from that point, still this does not determine the ownership of No. 3 to the west of the point of union—the very portion of it where the alleged trespasses have occurred.

It may be said, also, of the other two veins in controversy, that, if their apices are to be found in the Pennsylvania claim, as they rise up to the fault or surface to the south of the dis-

covery vein, or vein No. 11, according to the theory of the relators, then they are the property of the relator corporation.

It cannot be said of the evidence that it demonstrates the plaintiff's ownership of any of these veins. This court would hesitate to so find upon the facts in this record, even in an action brought for the purpose of determining the question of ownership. Much of it is speculative in character, and is based upon projections made upon conclusions from facts observed in workings remote, in some instances, by hundreds of feet from the particular points in controversy. Under these circumstances the conviction should not be sustained.

One fact, however, appearing from the record of the *Pennsylvania Case*, demonstrates that the action of the district court in this proceeding cannot be justified. The pleadings presenting the issues in the *Pennsylvania Case* were introduced in evidence. From them it is apparent that the points in controversy here were not involved in the action, and therefore could not have been embraced by the decree. At the close of the evidence the plaintiff asked and obtained leave to amend the complaint. The amendment was made. This required an amendment to the answer, which set up the fact, as matter in abatement of the action (see statement preceding opinion in *Montana Ore Purchasing Co. v. Boston & Montana C. C. & S. M. Co.*, 27 Mont. 288, 70 Pac. 1114), that the suit had been brought originally as an action at law for damages for trespass by the defendants upon the points in controversy in the action, and equitable relief had been sought only as ancillary to the law action; and that, as the action had been dismissed as to the count for damages, the count for ancillary relief should also be dismissed. A count for damages set up in the original complaint had, as a matter of fact, been dismissed, and the defendant thus sought to have the action abate as a whole. The replication of the plaintiff to this answer contained the following: "And plaintiff denies that at the time of the commencement of this action it commenced an action at law to recover from the defendant for alleged trespass upon the veins claimed in this action by the plaintiff, or

that it made the allegations therein which are stated in defendant's answer to plaintiff's amendments to its complaint, but avers the fact to be that at the time of the commencement of this action there were included in the complaint two causes of action—one at law for the recovery of damages for ores extracted by the defendant from veins within the Pennsylvania lode claim, which were alleged to have their tops or apices in the Johnstown lode claim, and the parcel of ground owned by the plaintiff; that said veins referred to in said cause of action lie far to the south of the veins which have been developed by the workings made by the plaintiff within the Pennsylvania lode claim." Inasmuch as the court found all the issues for the plaintiff, and the evidence in this record shows conclusively that these veins are the only ones within the Pennsylvania claim south of the discovery vein, it is manifest that they were excluded from the issues, and hence the title to them could not have been determined.

Under the circumstances presented in this record, contempt proceedings are not the appropriate remedy. Where the title to property has been once finally adjudicated, and it appears from the judgment record, or from the record supplemented, if necessary, by evidence identifying the subject-matter, that this is the case, and that the defendant has been enjoined from further interference, contempt proceedings must be resorted to. (*Montana Ore Purchasing Co. v. Boston & Montana C. C. & S. M. Co.*, 27 Mont. 410, 71 Pac. 403.) This was held in the case cited with reference to the same veins now in controversy, the theory of this court being that, as the complaint alleged ownership in the plaintiff under the decree rendered in the *Pennsylvania Case* (27 Mont. 288, 70 Pac. 1114), it would be most effectively enforced to prevent trespass in violation of the injunction contained therein by contempt proceedings, these furnishing a complete and adequate remedy. Now, it appears that the claim made in that case is not true, and that contempt proceedings have been resorted to to adjudicate and settle title to property in no way affected by the decree. This may not be

done. Such proceedings are not appropriate. For this purpose there must be issues presented by formal pleadings in an appropriate form of action at law or in equity, after due notice, when the parties may be heard in the usual way. And it must always be the case where there is a *bona fide* controversy as to ownership of property which has not been adjudicated; otherwise a party might be summarily deprived of his property without due process of law. This rule may be deduced from the following authorities: *Ex parte Hollis*, 59 Cal. 405; *State ex rel. Boardman v. Ball*, 5 Wash. 387, 31 Pac. 975, 34 Am. St. Rep. 866; *Wirt v. Brown*, (C. C.) 30 Fed. 187; *Onderdonk v. Fanning*, (C. C.) 2 Fed. 568; *Temple Pump Co. v. Goss Pump & R. B. Mfg. Co.*, (C. C.) 31 Fed. 292; *Baldwin v. Hosmer*, 101 Mich. 119, 59 N. W. 432, 25 L. R. A. 739; *In re Paschal*, 10 Wall. 483, 19 L. Ed. 992; Beach on Receivers, Sec. 241.

Counsel for respondents in this proceeding invoke the rule that "a judgment is conclusive upon the parties, not only as to such matters as were in fact determined in the proceeding, but as to every other matter which the parties might have litigated incident to or essentially connected with the subject-matter in litigation, whether the same, as a matter of fact, were or were not considered." We shall not now stop to consider whether this is a correct statement of the rule under the statute and the decisions of the state. (Code of Civil Procedure, Sec. 3196; *Campbell v. Rankin*, 2 Mont. 369; *Meyendorf v. Frohner*, 3 Mont. 318; *Kleinschmidt v. Binzel*, 14 Mont. 54, 35 Pac. 460, 43 Am. St. Rep. 604.) As we have already pointed out, the rule does not apply to the circumstances of this controversy, for the reason that the issues in the case in which the decree was rendered expressly excluded a consideration of the situation and ownership of the veins in dispute.

Counsel for relators have devoted a considerable portion of their argument to questions touching rulings of the court in admitting and excluding evidence upon the hearing in this proceeding in the court below. As the order must be vacated, it is not necessary to consider these questions.

The order of the district court is vacated with directions to dismiss the proceeding.

Order vacated.

MR. JUSTICE HOLLOWAY: In order to support a conviction in a contempt proceeding, the proof of guilt ought to be clear and convincing, leaving no reasonable doubt of such guilt. For the reason that the judgment roll in the *Pennsylvania Case*, together with the other evidence received on the hearing in this proceeding, does not furnish that convincing proof that veins 3, 7 and 10 were adjudicated in the *Pennsylvania Case*, I agree with the order vacating the order of the district court holding relators guilty of a violation of the decree in that case.

Nothing said in the determination of this proceeding should be susceptible of any interpretation which would apparently indicate an opinion of the court as to the actual ownership of the ore bodies in controversy, or as to the effect of the testimony given, aside from holding it insufficient to support the order of the court below.

MORRISON, RESPONDENT, v. ORNBAUN ET AL.,
APPELLANT.

(No. 1,805.)

(Submitted March 2, 1904. Decided March 14, 1904.)

Promissory Note—Collection Without Suit—Right to Attorney's Fees.

1. Under Civil Code, Section 3996, as amended (Session Laws of 1899, page 124), a note made payable with reasonable attorney's fees entitles the holder to collect such fees, where the note is not paid at maturity, and it is placed in the hands of attorneys for collection, though it is not sued.
2. The right to collect attorney's fees pursuant to the provisions of a mortgage note, where the note is not paid and is placed in the hands of attorneys for collection, though the note is not sued, is not controlled by a stipulation in the mortgage for such fees in case of suit.

Appeal from District Court, Fergus County; E. K. Cheadle, Judge.

ACTION by Mary A. Morrison against Maggie M. and Breck Ornbaun. From a judgment for plaintiff, defendants appeal. Affirmed.

STATEMENT OF THE CASE.

Plaintiff commenced this action to obtain judgment against defendants for the sum of \$200, alleged to be due upon a promissory note, together with an attorney's fee, and for the foreclosure of a mortgage given to secure the payment of the note. The district court sustained plaintiff's demurrer to defendants' amended answer. Defendants have appealed.

The note reads as follows: "One year after date we jointly and severally promise to pay to the order of Mary A. Morrison two hundred dollars for value received. Negotiable and payable at the Judith Basin Bank in Lewistown, Montana, with interest from date at the rate of twelve per cent. per annum until paid, and reasonable attorney's fees. The makers and endorsers hereby waive presentment, demand, protest and notice thereof."

The mortgage provided for the payment of the "costs and charges of foreclosure suit, including reasonable counsel fees to be fixed and allowed by the court."

Some months after the maturity of the note, and prior to the commencement of this suit, Messrs. Cort & Worden, attorneys for plaintiff, in whose hands the note had been placed for collection, demanded payment thereof from defendants. Thereupon defendants tendered to said attorneys the amount of principal and interest then due on the note, together with \$17 which plaintiff had paid out for insurance on the mortgaged property, amounting to \$251 in all. The attorneys demanded in addition thereto the sum of \$20 as an attorney's fee. This sum the defendants refused to pay. In order to keep their tender good, they deposited the \$251 in the Judith Basin Bank to plaintiff's

credit, and gave her notice thereof, as provided by Section 2035, Civil Code. The defendants pleaded this tender in their amended answer.

Messrs. Blackford & Blackford, and Mr. F. W. Mettler, for Appellants.

Messrs. Cort & Worden, and Mr. H. S. Hepner, for Respondent.

MR. COMMISSIONER CALLAWAY prepared the statement of the case and also the opinion for the court.

Did the attorneys for plaintiff rightfully demand an attorney's fee for the collection of the note? Counsel for defendants contend that the attorney's fee was payable only in the event of a suit brought to enforce collection of the note. The precise point has not heretofore been before this court. *Bank of Commerce v. Fuqua*, 11 Mont. 285, 28 Pac. 291, 14 L. R. A. 588, 28 Am. St. Rep. 461, and *Stadler v. First National Bank*, 22 Mont. 190, 56 Pac. 111, 74 Am. St. Rep. 582, were cases construing the negotiability of notes containing stipulations providing for the payment of attorney's fees in the event of suit. It has been a mooted question as to whether stipulations for the payment of attorney's fees in addition to the amount of the principal and interest due on the note are valid. A majority of the courts seem to hold the affirmative, while others say such contracts are usurious and against public policy. (See discussion in note to *Kittermaster v. Brossard*, 55 Am. St. Rep. 437; *Stanford v. Coram*, 26 Mont. 285, 67 Pac. 1005.)

When the note was executed, and at the time of the trial, the contract was controlled by the terms of Section 3996 of the Civil Code, as amended (Session Laws 1899, p. 124), which prescribes: "A negotiable instrument may contain a pledge of collateral security, with the authority to dispose thereof, also a provision for reasonable attorney's fee or both." The terms of the section imply that the attorney's fee may be collected without

suit, because it provides that the negotiable instrument may contain a pledge of collateral security, with authority to dispose thereof, and this, of course, means without suit. The payment of the attorney's fee provided for in the note now in litigation is recoverable only in case the note be not paid at maturity. Such is the evident and reasonable interpretation of the language employed. The note is payable one year after date, with interest from date. Presentment, demand, protest and notice are waived. "On the principle of *noscitur a sociis*, it clearly follows that the agreement to pay attorney's fees could only become operative after the bill had been dishonored." (*Farmers' National Bank v. Sutton Mfg. Co.*, 52 Fed. 191, 3 C. C. A. 1, 17 L. R. A. 595.)

Incidentally it is well to note that the legislature, since the case before us was tried in the court below, has passed an Act intended to establish a law uniform with the laws of other states relating to negotiable instruments. Section 2 of the Act provides that the sum payable by the terms of a negotiable instrument is certain within the meaning of the Act, although it is to be paid "with costs of collection or an attorney's fee, in case payment shall not be made at maturity." (Session Laws 1903, Chapter 121, p. 237.)

Almost the identical question now presented to the court was passed on in *Moore v. Staser*, 6 Ind. App. 364, 32 N. E. 563. In that case the court held that an agreement to pay attorney's fees covered the fee of an attorney for the collection of the note, made necessary by the default of the maker, whether suit be brought or not. On rehearing the first decision was approved. *Moore v. Staser*, 6 Ind. App. 368, 33 N. E. 665.

In the case at bar it is disclosed by defendants' amended answer that Messrs. Cort & Worden were attorneys for plaintiff; that, prior to the time the tender was made, they demanded payment of the note from defendants; that the note was long past due; and that the defendants did not tender any sum whatever as an attorney's fee. Inasmuch as defendants failed to tender any sum as an attorney's fee, we are not called upon to express

an opinion as to whether the fee demanded by the attorneys for plaintiff was a reasonable one; nor is it contended by defendants that Messrs. Cort & Worden are not attorneys at law, and we therefore need not determine whether the word "attorney" means any other attorney than an attorney at law. Attorneys at law usually undertake to collect the sums due on promissory notes, as a part of the business of their profession and it appears that they were doing so in this case. Defendant's answer shows that they demanded a collection fee.

The court said in *Moore v. Staser, supra*: "When a party executing a note containing an unconditional agreement to pay attorney's fees, whether the amount is stated per cent. or undetermined, has failed to meet his obligation when due, and the payee, in good faith, and because he deems it necessary so to do in order to enforce collection, places the note in the hands of an attorney at law for collection, who renders professional services in and about the collection thereof, either by suit or otherwise, he must pay, in addition to the principal and interest, such reasonable attorney's fees as shall be sufficiently adequate to compensate him for the services rendered, in order to discharge the obligation. In no event, however, shall he be liable for a greater per cent. than that stipulated in the contract, where the per cent. is stated; but, when unlimited, then he shall pay a reasonable attorney's fee. As above stated, the right to collect an attorney's fee from a defaulting payor does not depend upon the institution and prosecution of a suit, but rather upon the question as to whether or not professional services have been rendered by an attorney at law in or about the collection of the principal of the obligation containing the stipulation for attorney's fees. In this case the question is not presented as to the extent of appellees' liability for attorney's fees, but simply whether or not the appellees are liable to pay any attorney's fees." In our opinion, the above quotation correctly sums up the law applicable to the matter now under consideration. The stipulation respecting an attorney's fee is intended for the benefit of the payee. It may often happen that the payee, if obliged to employ an attor-

ney, will be compelled to pay the latter more than the total amount of interest due upon the note to enforce its collection. Some courts, however, assert that the attorney's fee clause in promissory notes is really beneficial to the payor, as it tends to make him more punctual. They say that, if he knows he will be compelled to assume an additional burden in case he fails to redeem the paper at maturity, he will be careful to prevent its dishonor. On the other hand, it may be safely said that a very large number, if not a majority, of those who give notes, are unable to meet them at maturity. Upon these the attorney's fee provision may work a hardship, and for them no remedy can be suggested so long as our present statute obtains,—what they need is a preventive; they should not sign notes containing such a provision.

“It may be proper to add that, as contracts for the payment of attorney's fees are only upheld upon the ground that they are a reasonable indemnity against loss actually and necessarily occasioned by the failure of the payor, it follows that where expenses are unnecessarily, or where none are actually, incurred, the contract cannot be enforced. *Kennedy v. Richardson*, 70 Ind. 524; *Billingsley v. Dean*, 11 Ind. 331. The stipulation for the payment of attorney's fees only becomes operative when expenses have been actually and necessarily incurred in the employment of an attorney for the enforcement of collection, consequent upon the failure of the payor to keep his engagement, and then only to the extent of the expense actually paid or to be paid, or reasonably chargeable.” (*Goss v. Bowen*, 104 Ind. 207, 2 N. E. 704.)

But it is also contended by counsel for defendants that the note and mortgage must be construed together, and, as it was provided in the mortgage that an attorney's fee might be allowed in case of suit, that stipulation is controlling, in preference to the one contained in the note. Not so. In executing the note and mortgage, the parties must have contemplated these three possibilities: That the note might be paid at maturity; that it might be collected after maturity by an attorney without suit;

that it might be collected after maturity by a suit including a foreclosure of the mortgage. The provision for an attorney's fee in the mortgage was therefore only cumulative.

It occurs to us that the defendants have no cause to complain because the plaintiff endeavored to collect the amount of the note without suit. It was to the interest of both parties that it be paid without litigation. When the plaintiff placed the note in the hands of her attorneys for collection, the evident purpose was to collect the amount due thereon without the expense of a suit, and the attorney's fee charged would in such case be much less than would be assessable in case of suit. Defendants had violated their contract—had allowed their note to become dishonored. Action might have commenced on the note immediately after maturity, at the option of plaintiff. Defendants would then have been subjected to a much heavier attorney's fee than that asked, together with considerable court costs. Plaintiff ought not now to be compelled to pay the costs and charges of collection merely because, in the first instance, she adopted the course least expensive to defendants.

It follows that the judgment should be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment is affirmed.

MARES, RESPONDENT, v. DILLON, APPELLANT.

(No. 1,801.)

(Submitted March 2, 1904. Decided March 21, 1904.)

Mining Claims—Location—Requirements of State Statutes—Constitutionality and Validity—Stare Decisis—Actions to Determine Adverse Claims—Nature—Suits in Equity—Effect—Estoppel—State and Federal Statutes—Other Action Pending—Abatement—Instructions—Estoppel to Object.

30	117
30	145
30	191
30	117
33	522
34	279
30	117
35	338
30	117
38	132

1. *Held*, in view of the former decisions of this court, that Political Code, Sections 3610 *et seq.*, providing additional requirements for valid locations of mining claims to those required by the Acts of Congress, are not in violation of the U. S. Constitution and Acts of Congress (though the court entertains serious doubts as to the correctness of its former rulings in this matter).
2. In the absence of proof tending to impeach the truth of the facts stated in a declaratory statement for a mining claim, it is immaterial to an adverse locator that the declaration was verified on information only.
3. That the locator of a mining claim verified the declaratory statement on information only, instead of on his personal knowledge, did not render the statement void under Political Code, Section 3612, requiring such declaratory statement to be verified by the "oath of the locator."
4. Defendant filed an application for a patent of a mining claim, the survey of which conflicted at different points with two locations made by plaintiff, known respectively as the "G. H." and "G. R. H." claims, neither of which conflicted with the other. Plaintiff filed an adverse claim on behalf of each of his claims, and afterwards brought a separate suit in support of each, and defendant, in answering the suit on the G. H. claim, referring to the action brought on the G. R. H. claim, alleged that in that action no claim was made to any portion of defendant's location by virtue of plaintiff's alleged ownership of the G. H. claim. *Held*, that plaintiff's actions were separate and distinct, and therefore the pendency of the one was no bar to the other.
5. Since U. S. Rev. St. Sec. 2326 (U. S. Comp. St. 1901, p. 1430), providing that an adverse claimant to a mining claim, within thirty days after filing his claim, must commence proceedings in a court of competent jurisdiction to determine the right of possession, etc., does not prescribe the form of action, the character of the suit to be brought thereunder depends on state practice.
6. U. S. Rev. St. Sec. 2326, as amended by Act March 3, 1881, c. 140, 21 Stat. 505 (U. S. Comp. St. 1901, p. 1430), providing that, if title to the ground in controversy in an action to establish an adverse claim to a mining location shall not be established by either party, the jury shall so find, does not require that such finding should be by a jury, where the suit to determine the adverse claim is in equity.
7. Code of Civil Procedure, Section 1310, provides that an action may be brought by any person against another, who claims an estate or interest in real property adverse to him, to determine such adverse claim; and Section 1322 declares that, in an action to determine the respective rights of claimants to the possession of a mining claim, it is immaterial which party is in possession, and that it is sufficient if it appears from the pleadings that an application for a patent has been made and an adverse claim filed and allowed, and requires the verdict or decision to find which party is entitled to possession of the premises. *Held*, that where the complaint in an action to determine an adverse claim to a mining location set up the filing of plaintiff's adverse claim, as provided by Section 1322, after defendant had applied for a patent, and prayed that defendant be required to set forth the nature of his claim to the ground, and that all adverse claims of defendant might be determined by the judgment of the court, and the answer denied plaintiff's ownership and possession, and prayed that defendant be adjudged to be the owner and entitled to possession of the premises sued for, the suit was one of equitable cognizance, and not an action at law.
8. Where, on the trial of a suit to determine an adverse claim to a mining location, a jury was not demanded by either party, and the court tried the case as a suit in equity, without objection by defendant, the latter was estopped to object for the first time on appeal that the action was one at law, and that he was entitled to the verdict of the jury as to which, if either, party was entitled to possession of the ground in question.

9. Where, in a suit to determine an adverse claim to a mining location, defendant was estopped to deny that the suit was equitable in its character, he could not object to instructions to the jury.

Appeal from District Court, Lewis and Clarke County; J. M. Clements, Judge.

ACTION by Frank Mares against Richard Dillon, in support of an adverse claim to a mining location. From a judgment in favor of plaintiff, and from an order overruling a motion for a new trial, defendant appeals. Affirmed.

Mr. T. J. Walsh, for Appellant.

We desire to present for the consideration of the court, first, that the statute of the state of Montana is unconstitutional and void, because the legislature of the state has no power to legislate upon the subject at all, or if it has that power, that the particular requirement of the statute unobserved in this instance is unreasonable and, therefore, void.

The question of the validity of the legislation attacked is approached not without much diffidence, in view of its universality, its apparent sanction by congress, the general acquiescence in it, and the adjudications of this court upon it.

Notwithstanding these considerations, however, a study of the subject has convinced the writer that it is utterly indefensible and that but for the strong presumption of right which general and long continued acquiescence has given to the error, as it has given to many others, no lawyer would be heard to say that the state legislature has any power in the premises whatever.

This is a question affecting the disposition of the public lands. The controversy is as to which of the parties shall receive a patent for the land from the paramount owner, the government of the United States. The appellant has done everything which the laws of the United States specifically require him to do to entitle him to the land, but the respondent interposes and says that while that is true, he has not done certain other acts, which

the legislature of the state of Montana says he must do in order to entitle him to the possession of the ground in controversy, and to a patent for the same; the respondent further says that the appellant not having done these acts, he took possession of the ground, located it in compliance with the laws of Montana, and that by reason of so doing he should have a patent to it from the government of the United States. This contention the court sustains.

We submit that the power to dispose of the public lands is reposed by the Constitution of the United States exclusively in congress, and that the state law appealed to is unconstitutional by virtue of Section 3, Article IV, of the Constitution of the United States, as follows:

“The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belongs to the United States.”

It is by virtue of this provision of the Constitution that congress is authorized to pass laws for the sale of public lands. (*Pollard v. Hagan*, 3 How. 224; *DeLima v. Bidwell*, 182 U. S. 197.)

That the power granted by this section is exclusive has been conceded since the organization of the government. It has been so declared by the commentators on the Constitution and so held by the final arbiter on all questions of its construction. (2 Story on the Constitution, 1328; 2 Tucker on the Constitution, 605.)

Reference was made to the decisions of this court upon the question considered. In fact the question never has been decided by this court; that is to say, the effect of the above quoted provision of the Federal Constitution has never been considered by the court and, apparently, its attention has never been called to it. (*Wenner v. McNulty*, 7 Mont. 30; *O'Donnell v. Glenn*, 8 Mont. 248; *O'Donnell v. Glenn*, 9 Mont. 452; *Metcalf v. Prescott*, 10 Mont. 284; *McCowan v. Maclay*, 16 Mont. 234; *Sanders v. Noble*, 22 Mont. 119; *Purdum v. Laddin*, 23 Mont. 387.)

It accordingly appears from a study of the foregoing cases that so far as the question may be considered to have been adjudicated by this court, the decisions rest upon *O'Donnell v. Glenn*, and in *O'Donnell v. Glenn* the provision of the Constitution to which we now invite the attention of the court was neither urged nor considered. It was contended in *O'Donnell v. Glenn* that the statute was contrary to the provision of the organic act of the territory which gave to the legislature the right to legislate generally, but denied to it the right to pass any law "interfering with the primary disposition of the soil."

In brief, the court reaches the conclusion that the power to legislate upon these subjects had been either directly or by necessary implication conferred by congress upon the territorial legislature.

This case is, to say the least, not a direct authority for the exercise of this power by a state legislature. Congress may delegate certain powers to a territorial legislature. It can confer none on a state legislature. A state legislature derives none of its powers from congress. Its authority comes from the people of the state, as expressed in the constitution framed by them.

But it may be conceded that whatever power in the respect under consideration is conferred upon territorial legislatures, except such power as was presumed to be reposed in them by virtue of organic acts, an attempt was made by congress to give to state legislatures the same power.

It may even be conceded that congress attempted to confer upon state legislatures the power to legislate upon the subject and to authorize them to make rules and regulations, to enact laws prescribing the conditions upon which parties may be permitted to occupy, possess, use and exhaust public mineral lands or obtain patent to the same, but when this concession is made, we have just reached the threshold of the question, which is, can congress delegate to a state legislature any such power? *O'Donnell v. Glenn* simply held that the statutes of the United States had in terms delegated such power to the territorial legislature

and we concede, for the purpose of the argument, that it in terms delegated the same powers to state legislatures.

We desire to present to the court the question as to whether congress can constitutionally delegate any such power to the states. To begin, as above suggested, congress cannot delegate any power of legislation to the states. Our whole system of government is at war with any such idea. If the state legislature has this power at all, it is not derived from any act of congress. But it has no such power. The whole subject of the public lands is within the exclusive control of congress. By Section 3 of Article IV of the Constitution of the United States, congress is given power to dispose of and to make all needful rules and regulations respecting the territory or other property belonging to the United States. "Rules and regulations" in this section obviously means "laws." (*In re Higbee*, 5 Pac. 693.) And "territory" means "lands." (*U. S. v. Gratiot*, 14 Pet. 526.)

It will be observed that congress is given power not only to dispose of the lands of the United States, but to make all needful laws respecting them; and not to make some laws, leaving to the states power to make other laws, but congress is given power to make all laws that may be needed respecting these lands.

This language was deliberately chosen by the constitutional convention and the section was incorporated in the Constitution by reason of a condition of affairs existing at the time it was framed, the briefest study of which must convince any one that no power was left in the states to legislate concerning the public lands within or without their borders.

Conflicting grants had been made by the crown to various colonies of the lands lying west of the Alleghany mountains. Disputes over these lands became so acrid as very nearly to disrupt the confederacy before it was fairly started. With a view to relieve the situation, the congress of the confederacy, in 1780, passed a resolution urging all of the states to cede their lands and claims to lands to the general government, which undertook

by the resolution to hold them for the common benefit of all the states. (Ordronaux, 510.)

Virginia ceded all of her lands north of the Ohio river in 1784 and by her deed of cession made the United States trustee for all of the states. (*Indiana v. Kentucky*, 136 U. S. 429.) Massachusetts, New York, Maryland and other states did likewise. The cessions were not complete even at the time of the adoption of the Constitution, and Maryland refused to ratify it except upon the condition that Virginia should cede her remaining lands. (2 Tucker on the Constitution, 606.)

It is perfectly clear that the makers of the Constitution intended that there should be no room left to claim even that a vestige of power to legislate concerning the public lands should remain in the states and that whatever laws might be necessary respecting them congress should make. It has been so repeatedly declared by the courts both of the states and the nation. (*Irvine v. Marshall*, 20 How. 558; *Wilcox v. Jackson*, 13 Pet. 498; *Gibson v. Choteau*, 13 Wall. 92-104; *Seymour v. Sanders*, 3 Dill. 437 (12,690); *Russell v. Lowth*, 21 Minn. 167; *Miller v. Little*, 47 Cal. 348; *Van Brocklin v. Anderson*, 117 U. S. 151-167; *Cross v. Harrison*, 16 How. 164; *Headley v. Coffman*, (Neb.) 56 N. W. 701-703.)

It is impossible, therefore, to doubt that "all needful rules and regulations respecting" the public lands must be made by congress. And this power having been placed in the hands of congress by the Constitution, it cannot, of course, be delegated to any other legislative body. The power to make laws cannot be delegated. (*Ex parte Wall*, 48 Cal. 279; *State v. Simons*, 21 N. W. 750; *Field v. Clark*, 143 U. S. 649.)

This rule is, of course, subject to the qualification that certain legislative functions may be reposed in subordinate municipalities, but it is needful to say that the states sustain no such relation to the general government. The people in framing the Constitution entrusted to the general congress the making of laws respecting the public lands and never contemplated that that power was to be delegated to any other legislative body.

To what purpose did Maryland insist on cession by Virginia of her lands, if the latter might prevail upon congress to reinvest her with the power to prescribe either in whole or in part the terms and conditions upon which those lands should be disposed of?

Under our present law, at least as much is prescribed by the state statute as by the United States statutes, concerning what shall be done to constitute a valid location of a mining claim. But if the congress can delegate to the state the power to prescribe any of the conditions of a valid location, it may repeal the existing United States statutes in relation thereto and provide that the state legislature may prescribe all the conditions upon which mining claims may be located.

Having in mind the particular ground of objection in *O'Donnell v. Glenn*, the opinion, near the close, said: "By the reservation to itself of the sole right to dispose of the soil in the first instance, congress meant to make title to its purchasers, and receive the product of the sales, and not regard these local regulations looking to the acquisition of possessory rights merely, and their manner of enjoyment, as an interference with its prerogatives."

Of course no such comment could ever have been made upon a consideration of the constitutional provision giving to congress full power not only to "dispose of," but also to "make all needful rules and regulations respecting" the public lands. Had the state or territory not legislated upon the subject at all, a valid location could be made under the laws of the United States by simply discovering the vein and marking the location on the ground so that its boundaries could be readily traced. A location so made would give the locator more than possessory rights merely. A pre-emptioner settled upon the public domain has possessory rights merely. His rights rest upon possession alone; when he loses possession, he loses his rights. He has no property in the land that can be seized on execution, that can be sold or assigned to any person, or that will descend to his heirs, or that he can devise by his will. At his death the place

is subject to settlement by the first occupant regardless of any attempted disposition on his part.

Not so with a mining claim located according to law. Until within recent years the state of Washington has not attempted to pass any laws regulating the manner of locating mining claims or providing even for the filing of a location notice. But a mining claim located in the simple manner prescribed by the laws of the United States in that state became the property of the locator. (*Maunel v. Wulff*, 152 U. S. 511; *Silver Bow v. Clarke*, 5 Mont. 378; *Noyes v. Mantle*, 127 U. S. 351; *Dahl v. Raunheim*, 132 U. S. 262; *Sullivan v. Iron Silver Mining Co.*, 143 U. S. 431.)

Accordingly, the act of the legislature of the state of Montana must be regarded as laying down conditions for the "disposal" of the public domain, to say nothing of the further clause of Section 3 of Article IV, giving congress sole power to make rules and regulations "respecting" the same.

No one would pretend to doubt that if congress should enact a law declaring that location should be valid notwithstanding the notices did not contain a description of the markings on the corner, state statutes making such requirement would be invalid thereafter. But if the state statute ever did have any force, it must have been either because the power to pass it was delegated to the state legislature by congress, or because some power was left in the states to legislate upon the subject of the public lands, subject, however, to the paramount right of congress,—in other words, that the power of congress was not exclusive. Both of these positions have been shown to be untenable.

The mind glides easily into the belief that these laws are valid, because they have been in force so long and their validity has gone unquestioned. But suppose congress should pass an act authorizing the state legislatures to prescribe additional conditions upon compliance with which only could homestead claimants hold possession or obtain patents to their homesteads, and the state legislature should pass a law providing that all homestead claimants should be required to post a notice of location

upon their claims and within ninety days mark the boundaries by stakes at each corner, four inches square, by four feet six inches in length, set one foot in the ground, with a mound of earth or stone four feet in diameter by two feet in height around the post, and mark each post so as to designate the particular corner for which it stood; that they should within six months plow and sow at least ten acres (the counterpart of the discovery shaft) and within ninety days file in the office of the county recorder of the county in which the property is situated a notice of the entry specifying among other things, the markings on the corner posts, and should provide, in effect, that in case of failure by the settler to observe any of these requirements the land should be subject to appropriation by any other settler, who would be heard to attempt to justify or defend such legislation?

Still, if congress can empower the state legislature to legislate with respect to mineral lands, or if it has that power without authorization by congress, it can be empowered with or enjoys exactly the same right with respect to agricultural lands.

We must likewise, to admit the validity of these laws, maintain that congress may empower the state to add terms and conditions to those prescribed by it as a condition upon which a desert claim may be held and patented, a coal claim, a claim taken under the timber and stone act, under the forest reserve act, the act providing for soldiers' additional homesteads. In other words, we must concede the power of congress to authorize the state legislatures to supplement in any way they may see fit the acts of congress concerning the disposition of the public domain.

Power is apparently delegated to the state by Section 2324, R. S. U. S., to make such laws as it may see fit "governing the location, manner of recording and amount of work necessary to hold possession of a mining claim," but it is provided by this section that "not less than one hundred dollars' worth of labor shall be performed or improvements made during each year." If this is a valid delegation of power, the state law may require

a thousand dollars' worth of work each year, or the locator loses the property (*Belk v. Meagher*) which he acquired by his location and forfeits his right to acquire the legal title by patent from the government. If it were such a law the appellant was attacking, instead of one prescribing the contents of a location notice, the task would be a much easier one, simply because it would be a more unusual law. So firmly do we believe that whatever is, is right, and so much more firmly that which long has been.

Such a law as that suggested above would immediately invite attention to and inquiry concerning the source of power exercised in its passage. It is more or less significant that no state or territory has ever required by its laws more than one hundred dollars' worth of work annually and now, after the mining act has been in force thirty years, it is ventured that not more than one miner in each one hundred would concede that the state has any right to exact of him more than one hundred dollars' worth of work annually, and not more than one lawyer in ten would disagree with this opinion.

And yet the power to so legislate rests on exactly the same foundation as the law, the validity of which is here questioned. There should be uniformity in the law concerning the location of mining claims. A prospector going from Montana to Idaho must unlearn what he has learned concerning the Montana law and study the Idaho statutes or he risks the loss of a valuable claim he has discovered by his skill, labor, energy, privation and endurance. If he goes to Nevada, he must begin the lesson anew. If congress but did its duty and legislated on the subject, there would be uniformity. The man who knows how a homestead or desert claim is taken or acquired in one state may go to the bounds of the union and enter one in the same manner.

No fair or reasonable pretense, even, can be made that the constitutionality of such laws was ever considered or passed upon by the Supreme Court of the United States, or that it even impliedly expressed an opinion on the subject in any case.

Although it would be vicious legislation, congress might possibly pass an act simply declaring that all existing rules established by miners' conventions or state laws should be in force and effect. It might be argued that the adopting act by reference embraced them so that they became a part of it. But no one would contend that a law authorizing them in the future to promulgate rules and laws and providing that such should have the effect of federal statutes could be sustained. That would be a clear delegation of legislative power. But whatever congress might do in this direction, it never has done anything like it. "The recognition by congress of local customs and statutory provisions as at times controlling the right of possession does not incorporate them into the body of federal law." (*Shoshone v. Rutter*, 177 U. S. 505.)

The law in question is, accordingly, a state law, and in no sense a federal law. It need not be argued that if congress cannot delegate to a grave, decorous and constitutional body such as a state legislature power to enact these laws, it cannot delegate such power to a miners' meeting or convention.

Nor does it help the matter to speak of these laws as local rules. The constitutional provision under consideration gives to congress the exclusive power to make all needful "rules" respecting the public lands. If these laws can be sustained then we must admit the power of congress, having repealed all existing laws for the disposition of public lands, to pass an act providing that they shall be patented to such persons on such condition as the legislatures of the states respectively in which they lie shall prescribe.

Not an idea has been advanced to sustain the power of the state to legislate in the premises, save that it has done so for many years and that, without consideration, courts have assumed the constitutionality of these laws. No foundation is even suggested to the court upon which it can stand to uphold these measures.

Unless some reason not even hinted at by counsel in either brief or argument can be advanced to show the inapplicability

of the apparently plain provisions of Section 3 of Article IV of the National Constitution, it is the plain duty of the court to declare the law attacked as an usurpation.

Messrs. H. G. & S. H. McIntire, for Respondent.

MR. COMMISSIONER CLAYBERG prepared the following opinion for the court:

Appellant, Dillon, made application to the United States land office for a patent to the Black Eagle quartz lode mining claim. Respondent, Mares, filed two adverse claims in the land office against this application—one based upon the Gold Hill quartz lode claim, and one based upon the Gold Rocky Hill quartz lode claim, with both of which the surface of the Black Eagle was in conflict. Within the time allowed by the statute of the United States, respondent instituted two suits, in support of his adverse claims (one on each of his locations), in the district court of Lewis and Clarke county. In the appeals under consideration, the suit based upon the Gold Hill location is involved. The action was tried by a court and jury, and from the judgment entered in favor of the validity of the Gold Hill location, and from an order overruling his motion for a new trial, appellant appeals.

VALIDITY OF STATE STATUTE.

Counsel for appellant insists, with great force and much reason, that the statutes of Montana requiring certain acts to be performed by one locating a mining claim, in addition to the requirements of the Acts of Congress (Section 3610 *et seq.*, Political Code), are in violation of Section 3, Article IV, of the Constitution of the United States, which provides: "The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the

United States, or of any particular state." Also, that these requirements are inconsistent with the provisions of the Acts of Congress in regard to the location of mines, and therefore void. Also, if these provisions of the state statute are held to be permitted or recognized by the Acts of Congress, then such Acts, to that extent, are in violation of the above section of the Constitution of the United States.

The question of the constitutionality and validity of our present statute, and of the provisions of the territorial statutes of a somewhat similar character, have been before this court and its predecessor, the supreme court of the territory, quite frequently, and we find that, whenever this question was discussed and decided by either court, the validity and constitutionality of these statutes have been uniformly upheld.

In *O'Donnell v. Glenn*, 8 Mont. 248, 19 Pac. 302, the court for the first time directly considered the point made, relative to the constitutionality of the Acts of the legislative assembly of the territory, and holds such legislation valid. Chief Justice McConnell says: "By the reservation to itself of the sole right to dispose of the soil in the first instance, congress meant to make title to its purchasers, and receive the product of the sales, and not to regard those local regulations, looking to the acquisition of possessory rights merely, and their manner of enjoyment, as an interference with its prerogatives." Of course, some distinction might be drawn between the legislative Acts of a territory and of a state, as to whether they conflict with the Acts of congress, the former being always under the direct control and supervision of congress, while the latter, if upon proper subjects of legislation, are entirely beyond congressional control.

In *Metcalf v. Prescott*, 10 Mont. 283, 25 Pac. 1037, this court had the matter under consideration for the first time, and says: "This court, after incidentally doubting the validity of the law of the territory requiring a location notice to be verified (*Wenner v. McNulty*, 7 Mont. 30 [14 Pac. 643], afterwards, in *O'Donnell v. Glenn*, 8 Mont. 248 [19 Pac. 302], met the proposition squarely, and held the law to be good. While we

can conceive doubts as to this power of the territorial legislature, we do not feel it our duty to disturb the rule in *O'Donnell v. Glenn*, and the practice established upon that rule. We therefore sustain the law."

The question came up for consideration again in this court in the case of *McCowan v. Maclay*, 16 Mont. 234, 40 Pac. 602, and Mr. Justice DeWitt says: "Our statute requires that the notice of location of a mining claim shall be on oath. Comp. St. Fifth Div. Sec. 1477. That this requirement of our statute is within the power of the state legislature was doubted in *Wenner v. McNulty*, 7 Mont. 30 [14 Pac. 643], but was finally affirmed in *O'Donnell v. Glenn*, 8 Mont. 248 [19 Pac. 302], which ruling was afterwards followed as the law of the case on the second appeal of *O'Donnell v. Glenn*, 9 Mont. 452 [23 Pac. 1018, 8 L. R. A. 629], and was followed as *stare decisis* in *Metcalf v. Prescott*, 10 Mont. 283 [25 Pac. 1037]. The Ninth Circuit Court of Appeals of the United States recently encountered this question in *Preston v. Hunter*, 67 Fed. 996 [15 C. C. A. 148], but passed it without an expression of opinion. We shall not now disturb the law of this jurisdiction in this respect."

The question was again before this court in the case of *Berg v. Koegel*, 16 Mont. 266, 40 Pac. 605. The court say: "This decision [of the court below] is made upon the authority of *McCowan v. Maclay*, 16 Mont. 234 [40 Pac. 602], to the effect that our statute requiring the location notice to be verified is not in conflict with the laws of the United States upon the subject of the location of mining claims."

It was again before this court in the case of *Purdum v. Laddin*, 23 Mont. 387, 59 Pac. 154, where the court uses the following language: "That the legislative assembly had power to enact Sections 3610 to 3613 of the Political Code is, in this state, too firmly established to permit of serious discussion or doubt; and that the provisions of these section are mandatory, reasonable and not in conflict with any Act of congress, seems clearly within the principles announced or tacitly recognized

in *O'Donnell v. Glenn*, 8 Mont. 248 [19 Pac. 302], *McCowan v. Maclay*, 16 Mont. 234 [40 Pac. 602], and *Sanders v. Noble*, 22 Mont. 119 [55 Pac. 1037].”

It was again before this court for consideration in the case of *Baker v. Butte City Water Co.*, 28 Mont. 222, 72 Pac. 617, and the court said: “The question as to the right of the legislature to provide rules for the marking of the boundaries of mining claims, and providing for a record of such location, and what the record paper must contain, has so long been recognized in this state, and has so many times been approved by this court, that it would be useless to enter again into any consideration of the questions so decided.”

To now hold these statutes unconstitutional or void, would be to reverse these uniform decisions, which have been followed and relied upon for many years; and this should not be done unless, in the opinion of the present court, such result would be the only one possible to be reached from a consideration of the questions. We would not, therefore, be justified in such a conclusion, if, after a careful investigation, we felt any doubt as to their correctness. We cannot say that we have an “abiding conviction” that these decisions are erroneous, but, at most, only that we have serious doubts as to their correctness.

While the Supreme Court of the United States has not, to our knowledge, had the question presented to it in the same form that it is presented in this case, yet that court has indirectly at least, in many instances, held that the legislatures of the states might enact laws supplemental to the Act of congress relative to the location, possession and working of a mining claim. (*Erhardt v. Boaro*, 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1113; *Iron Silver Mining Company v. Elgin M. & S. Co.*, 118 U. S. 196, 6 Sup. Ct. 1177, 30 L. Ed. 98; *Enterprise M. Co. v. Rico Aspen M. Co.*, 167 U. S. 108, 17 Sup. Ct. 762, 42 L. Ed. 96; *Parley's Park S. M. Co. v. Kerr*, 130 U. S. 256, 9 Sup. Ct. 511, 32 L. Ed. 906.)

The same doctrine is held by the Court of Appeals of the Ninth Circuit, in *Northmore v. Simmons*, 97 Fed. 386, 38 C.

C. A. 211. The Supreme Court of Nevada has reached the same conclusion in *Sisson v. Sommers*, 24 Nev. 379, 55 Pac. 829, 77 Am. St. Rep. 815. Also the Supreme Court of Utah, in *Copper Globe Min. Co. v. Allman*, 23 Utah, 410, 64 Pac. 1019.

Questions of the construction of the Federal Constitution and statutes can be finally settled only by the Supreme Court of the United States. This court should not assume the authority to declare any Acts of congress to be in violation of the provisions of the Constitution of the United States, except in cases entirely clear and free from doubt. Such decision by this court would only be binding within the state, and then only until the question should be finally decided by the Supreme Court of the United States. Again, if this court should hold these statutes void because in conflict with the Federal Constitution or Acts of congress, and locations should thereafter be made not complying with their requirements, and the Supreme Court of the United States should afterwards decide to the contrary and hold them valid, all location made in the interim, not complying with their requirements, would be void. This would be a calamity which should be avoided if possible. On the other hand, if this court holds these statutes valid, all locations must comply with their requirements in order to have validity, and, if the Supreme Court of the United States should afterwards decide that they were void, no one would be injured, because all locations made in conformity with these statutes would surely be valid, even if the statutes were void, as all the requirements of the Acts of congress would be fully complied with.

We, therefore, while entertaining very serious doubts as to the correctness of this court's past ruling, in consideration of the circumstances above set forth, must refuse to declare the legislative action of the state of Montana unconstitutional.

VERIFICATION.

The verification of the Gold Hill declaratory statement was made by Frank Mares, the locator. This verification seems cor-

rect in form and substance, and does not disclose but that it was made upon the personal knowledge of the affiant. However, evidence was given on the trial that the affidavit was made without any actual personal knowledge of the facts sworn to, but entirely upon information derived from affiant's brother and the engineer who had performed the specific acts of making the location. Counsel for appellant insists that this fact renders the location void.

The verification, by the terms of the statute (Section 3612, Political Code), is required to be made by the "locator" of the claim. Its object, as announced by the Supreme Court of the Territory of Montana, "was to prevent fraud by subjecting the locator to the penalties of perjury if he swore falsely or corruptly." If the verification is in form and substance in accordance with the statute, it is *prima facie* sufficient, and the facts stated therein are *prima facie* true. Of course, its effectiveness could be avoided by a proof that the facts verified did not exist or were untrue. This record does not disclose that any evidence was offered to challenge the truth of the affidavit, nor is it claimed that any of the facts therein stated did not exist or were not true. Therefore we must consider the verification as true, and we cannot conceive how appellant was injured, even if it was not made upon the personal knowledge of the affiant, but upon information. What concerns him is the truth of the facts verified.

Again, the statute simply provides that the statement "must be verified by the oath of the locator," etc. (Section 3612, Political Code), not that it shall only be made upon the personal knowledge of the affiant. As well said by Chief Justice McConnell, in considering a similar provision in the territorial statute, in the case of *Wenner v. McNulty*, 7 Mont. 30, 14 Pac. 643: "It is not usual to require such strictness, unless the statute prescribing the oath expressly requires it. The object of recording the declaratory statement is to give the public notice that a location has been made; and the object of requiring an oath was to prevent fraud, by subjecting the locator to

the penalties of perjury if he swore falsely and corruptly. If the affiant in such cases swears falsely and corruptly, he will be as much amenable to the penalties of the law denounced against perjury as if he had made the oath upon his own alleged personal knowledge; and the mere fact that the oath is absolute in form, when in fact it was made upon information and belief, does not invalidate it. 12 Myer's Fed. Dec. Sec. 1047."

We therefore cannot hold that the location of the Gold Hill lode mining claim was void on this ground or for this reason.

ANOTHER SUIT PENDING.

Appellant sets forth in his answer the following facts, in substance: That, after he had filed his application for a patent to the Black Eagle quartz lode claim in the land office, respondent claimed that the surface area of the Black Eagle conflicted with the surface area of the Gold Hill quartz lode mining claim, and also with the surface area of the Gold Rocky Hill quartz lode mining claim, and thereupon filed an adverse claim based upon the location of the Gold Hill, and another based on the location of the Gold Rocky Hill; that afterwards respondent brought suit, in the district court of the First judicial district of Montana in and for the county of Lewis and Clarke, simultaneously on each of said adverse claims so filed, and that both suits are still pending. Counsel for appellant insists that respondent had but one cause of action, and that, having split this action into two suits, the pendency of the other suit prevents him from prosecuting this one. We find in the answer the following very pertinent allegation: "In which said action [referring to the action brought on the Gold Rocky Hill] no claim was made to any portion of said Black Eagle by virtue of plaintiff's alleged ownership of the Gold Hill lode mining claim." Respondent demurred to a portion of the answer, and, after hearing, the court sustained the demurrer thereto. To this counsel for appellant excepts, and urges the alleged error before this court.

It appears, from the plat attached to the answer, that respondent made two locations, one of which he designated the "Gold Hill" and the other the "Gold Rocky Hill;" that the surface of each of these locations conflicts with the surface of the Black Eagle, but the one does not conflict with the other. Respondent, as stated, filed a separate adverse claim to appellant's application for patent on the Black Eagle, based upon each of his two locations. We have no doubt but that this was entirely proper, and a justifiable practice, but counsel for appellant says that respondent had only one cause of action, and therefore could maintain only one suit. We think that this position is erroneous, and that respondent had two separate and distinct causes of action, one of which was based solely and exclusively on his location of the Gold Hill lode, and the other solely and exclusively on the location of the Gold Rocky Hill lode.

The action instituted is primarily for the purpose of determining who was entitled to the possession of the ground in controversy, and ultimately for the purpose of determining who was entitled to a patent for such ground. The purpose of adverse suits is in "aid of and for the information of the land department, to determine as between the litigants the right to the possession of the mining claim in dispute." (*Lavagnino v. Uhlig*, 26 Utah, 1, 71 Pac. 1046, citing *Doe v. Waterloo M. Co.*, 70 Fed. 455, 17 C. C. A. 190; *Wight v. Dubois*, (C. C.) 21 Fed. 694.)

Of course, the effect of a judgment in favor of respondent in either suit would be to prevent appellant from acquiring a patent from the United States for the surface ground in conflict between the locations in such suit, and to allow patent to the same to be issued to respondent. This was not the primary purpose of either suit, but would be the result of the judgment recovered.

We cannot see how the two suits instituted by respondent could possibly have been tried as one cause of action. Each is based upon a separate and distinct location. One location may

be good, the other bad. Respondent could only recover judgment upon a valid location, because the right of possession can only come from a valid location. The proof in each case would be entirely different; in one location respondent may have been the locator, in another he may have been the purchaser; so that proof in one case would not "fit" the other case, nor authorize judgment to be entered thereon. As we view the proposition, it is the same in effect as though A. held two promissory notes of B., each for a hundred dollars. Although they may bear the same date and be exactly identical in language and amount, each note constitutes a separate cause of action; and while A. may bring one suit against B. covering the two notes, each cause of action would have to be separately stated. A. would have the right to bring suit on one note and not upon the other. A judgment on one note would not be a bar to a suit on the other. The pendency of the suit on one note could not be pleaded in abatement to the pendency of a suit on the other note. If A. brought a separate suit on each note, the court, under our statute, might compel a consolidation of the causes, and try the two causes of action in the same case. So here, possibly, although we do not desire to express any definite opinion on this proposition, Dillon might have asked the court below to consolidate the two causes of action and have them heard at the same time, under the provisions of Section 1894 of the Code of Civil Procedure.

In order for the pendency of one suit to be pleaded in abatement in another suit, the two suits must be identical, at least in subject-matter and parties; so that, if a judgment upon the merits is obtained in one, that judgment becomes final as to both suits, and could be pleaded in bar in the other action. The question is, as this court has said, "Could the plaintiff in the former action have obtained all the relief which he alleges he is entitled to in the present action?" (*Wetzstein v. Boston & Montana Consol. C. & S. Mining Co.*, 28 Mont. 451, 72 Pac. 865.)

Recalling the allegation in appellant's answer, above quoted, we find that respondent made no claim, in the suit brought upon

the Gold Rocky Hill adverse, to any part of the Black Eagle lode claim which conflicts with the Gold Hill lode claim, and in this action based upon the Gold Hill location he makes no claim to any part of the Black Eagle which conflicts with the Gold Rocky Hill. There is therefore no identity of cause of action. How can we say that a judgment in one will bar a judgment in the other? The proof would be absolutely dissimilar.

The language of the Supreme Court of the United States in *Watson v. Jones*, 13 Wall. 715, 20 L. Ed. 671, is particularly in point in this regard. That court said: "When the pendency of such a suit is set up to defeat another, the *case* must be the same. There must be the same parties, * * * there must be the same rights asserted, and the same relief prayed for. This relief must be founded on the same facts, and the title or essential basis of the relief sought must be the same. The identity in these particulars should be such that, if the pending case had already been disposed of, it could be pleaded in bar as a former adjudication of the same matter between the same parties." Very true, the validity of the Black Eagle location is brought into question in each of the suits, but respondent's right of action depends not only upon the invalidity of the Black Eagle location, but upon the validity of his own location in each case.

CHARACTER OF THE SUIT.

As already stated, the suit was brought in support of an adverse claim against appellant's application for patent duly filed in the land office.

Section 2326 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1430] provides as follows: "Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided

by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim." Thus, the Act of congress provides that a suit shall be brought, in support of the adverse claim, within thirty days after the filing thereof, "in a court of competent jurisdiction."

The Supreme Court of the United States says, in regard to this section: "Thus the determination of the right of possession as between the parties is referred to a court of competent jurisdiction, in aid of the land office, but the form of action is not provided for by the statute; and, apparently, an action at law or a suit in equity would lie, as either might be appropriate under the particular circumstances—an action to recover possession when plaintiff is out of possession, and a suit to quiet title when he is in possession." (*Perego v. Dodge*, 163 U. S. 160, 16 Sup. Ct. 971, 41 L. Ed. 113.) In other words, the character of the suit depends upon the practice in the state in which the suit is brought. If, under the statutes of the state, an action to quiet title is provided for, such suit will be sufficient; if, under such statute, an action of ejectment is provided for, then the action may be in ejectment; if a statutory proceeding is provided for, it may be followed, but if such proceeding is made exclusive by the statute, then its provisions must be followed; so that the only question for us to determine is whether or not, under the statute and practice of Montana, the action brought by respondent is an action in equity, at law, or a special statutory proceeding.

Counsel for appellant seems to insist that he is entitled to a verdict of the jury upon the proposition as to which, if either, party to the suit is entitled to possession of the ground in conflict, and cites the amendment of March 3, 1881, c. 140, 21 Stat. 505 [U. S. Comp. St. 1901, p. 1430], to Section 2326,

which provides: "That if in any action brought pursuant to Section 2326 of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find."

This amendment was construed in the case of *Perego v. Dodge*, 163 U. S. 160, 16 Sup. Ct. 971, 41 L. Ed. 113, and the court said: "We do not think the intention of this Act was to change the methods of trial. Its manifest object was to provide for an adjudication, in the case supposed, that neither party was entitled to the property, so that the applicant could not go forward with his proceedings in the land office simply because the adverse claimant had failed to make out his case, if he had also failed. In other words, the duty was imposed on the court to enter such judgment or decree as would evidence that the applicant had not established the right of possession, and was for that reason not entitled to a patent. The whole proceeding is merely in aid of the land department, and the object of the amendment was to secure that aid as much in cases where both parties failed to establish title as where judgment was rendered in favor of either; and, while the finding by a jury is referred to, we think that where the adverse claimant chooses to proceed by bill to quiet title, and as between him and the applicant for the patent neither is found entitled to relief, the court can render a decree to that effect, just as it would render judgment on a verdict if the action were at law. If congress had intended to provide that litigation of this sort must be at law, or must invariably be tried by a jury, it would have said so. There is nothing to indicate the intention thus to circumscribe resort to the accustomed modes of procedure, or to prevent the parties from submitting the determination of their controversies to the court. It must be remembered that it is 'the question of the right of possession' which is to be determined by the courts, and that the United States is not a party to the proceedings. The only jurisdiction which the courts have is of a controversy between individual claimants, and it has not been provided that the rights of an applicant for public lands, as against the gov-

ernment, may be determined by the courts in a suit against the latter. *United States v. Jones*, 131 U. S. 1, 9 Sup. Ct. 669, 33 L. Ed. 90; *Last Chance Mining Co. v. Tyler Mining Co.*, 157 U. S. 683, 694, 15 Sup. Ct. 733, 39 L. Ed. 859."

Section 1310 of the Code of Civil Procedure provides: "An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim." This section would be sufficient of itself to give authority for the commencement and maintenance of a suit to determine the matters directed to be ascertained by Section 2326 of the Revised Statutes of the United States, without any further legislative action; but the legislature went further, and enacted Section 1322, which provides: "In an action brought to determine the respective rights of claimants to the possession of a mining claim or quartz lode, under the provisions of the Acts of congress of the United States, it is immaterial which party is in possession, and it is sufficient to confer jurisdiction upon the court, if it appears from the pleadings that the application for a patent has been made and an adverse claim thereto filed and allowed in the proper land office; and the verdict or decision must find which party is entitled to the possession of the premises in dispute."

The complaint in this case alleges that plaintiff "is the owner, except as against the paramount title of the United States, and is in the possession and entitled to the possession of all and singular that certain quartz lode mining claim." He then sets out the facts necessary to a valid location, and afterwards alleges that the defendant assumed to locate a part of the claim, and made an application to the land office for a patent thereto; that plaintiff filed his adverse and commenced this suit; then alleges that the defendant "is without any right whatever, and that said defendant has not any estate, title, interest or claim to the possession of the same, or any part thereof, and that the claim of the defendant thereto casts a cloud upon the title of this plaintiff in and to his said Gold Hill quartz lode mining

claim, and greatly interferes with and injures him in the use and enjoyment thereof." The prayer of the complaint is that the defendant be required to set forth the nature of his claim to the ground, "and that all adverse claim of said defendant may be determined by a judgment of this court."

The answer in the case denies the ownership of plaintiff, or that he is in possession or entitled to the possession of the premises, and then alleges defendant's location of the Black Eagle quartz lode mining claim, and that he made application for a patent upon the same; and prays that plaintiff take nothing by his suit, "and that the defendant be adjudged to be the owner and entitled to the possession of the premises sued for."

Both parties claim under separate locations of mining claims, and the suit was for the purpose of determining who had the right of possession to the ground in conflict, for the guidance of the land office in issuing a patent therefor.

It must be remembered that the prayer of plaintiff's complaint is that the defendant set up his adverse claims, and that the court determine that plaintiff is entitled to the possession of the property in question. The defendant sets up his adverse claim, and ends with practically the same prayer. We cannot conceive how this action could be treated as any other than one of equitable jurisdiction to determine an adverse claim. It has no semblance to an action at law, neither has the defense set forth in the answer any semblance to an answer setting forth a legal title to the premises. Both parties seem to desire the court to determine who is entitled to the possession of the premises on the adverse claim set forth. There is no allegation in the pleading upon which an action at law could be brought.

Again, appellant's attorney in the trial of the case (as recited in the record) took the position before the court below, in support of his application to submit special interrogatories to the jury, "that the interrogatories ought to be submitted because the case was in nature an action in equity."

The record does not disclose that a jury was demanded by either party. The court tried the case as an equitable case,

without objection on the part of appellant, as is very apparent from the fact that, in addition to the findings of the jury, it made several other findings. It is too late for appellant to urge the point in this court, for the first time, that the action was not one of equitable cognizance, but one at law, having tried the action in the court below as one of equity, and stated in that trial that it was a case of that character. The rule as announced by this court in the case of *Talbott v. Butte City Water Co.*, 29 Mont. 17, 73 Pac. 1111, as follows: "The matter was treated in the district court throughout as a suit in equity. In fact, the opening statement in appellant's brief is, 'This is an equitable action.' And without disposing of the question whether in fact it is an action at law or a suit in equity, it is sufficient to say that, when a cause has been tried upon a certain well-defined theory, neither party will be heard in this court, on oral argument, for the first time, to assume a position antagonistic to such theory. *Harris v. Lloyd*, 11 Mont. 390, 28 Pac. 736, 28 Am. St. Rep. 475; *Leavenworth N. & S. Co. v. Curtan*, 51 Kan. 432, 33 Pac. 297; *Davis v. Jacoby*, 54 Minn. 144, 55 N. W. 908." See, also, *Hendrickson v. Wallace*, 29 Mont. 504, 75 Pac. 355; *Perego v. Dodge*, 163 U. S. 160, 16 Sup. Ct. 971, 41 L. Ed. 113.

Two important questions suggest themselves, *i. e.*, Does Section 1322, *supra*, provide for a statutory proceeding in cases of this character? If so, does it intend that such proceeding should be exclusive? The consideration and determination of these questions do not arise in this case, as such proceeding would necessarily be equitable in character, and we have seen that appellant cannot question the equitable character of this suit.

We therefore hold, not only that the suit was actually one of equitable jurisdiction, but that appellant, by the admissions and action of his attorney in the lower court, is now estopped from saying that it was not.

Appellant's counsel having placed himself in a position where he cannot be allowed to question the equitable character of the suit, all of his objections to the instructions of the court to the

jury are unavailing. (*Hendrickson v. Wallace*, 29 Mont. 504, 75 Pac. 355, and cases cited.) The findings of the jury were therefore only advisory to the court, and the court was justified in making the necessary findings.

This disposes of all questions raised and argued by appellant's counsel.

We advise that the judgment appealed from be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order are affirmed.

MARES, APPELLANT, v. DILLON, RESPONDENT.

(No. 1,820.)

(Submitted March 2, 1904. Decided March 21, 1904.)

Mining Claims—Action to Determine Adverse Claims—Issues—Judgment—Costs—Appeal.

1. Where, in an action in support of an adverse claim to a mining location, the only part of the surface of the ground of plaintiff's location affected by the suit was that part which was in conflict with the surface of defendant's location, for which a patent had been applied for, the court's jurisdiction was limited to the extent of the conflict, and hence it was error for the court to render judgment determining the validity of a portion of plaintiff's location outside of the points of conflict.
2. Disbursements for filing an adverse claim to a mining location in the land office for surveying, the making of a plat, and for an abstract of title for use in the land office, were not taxable as costs under Code of Civil Procedure, Section 1866, authorizing taxation of disbursements for matters to be used in the trial of the cause.
3. An appeal does not lie from an order taxing costs, but the error, if any, may be considered on appeal from the judgment.

Appeal from District Court, Lewis and Clarke County; J. M. Clements, Judge.

ACTION by Frank Mares against Richard Dillon. From a judgment in favor of defendant, and from an order taxing costs, plaintiff appeals. Reversed.

Messrs. H. G. & S. H. McIntire, for Appellant.

Mr. T. J. Walsh, for Respondent.

MR. COMMISSIONER CLAYBERG prepared the following opinion for the court:

Appeal from judgment and order taxing costs. Respondent (Dillon) made application to the United States land office for a patent to the Black Eagle lode claim. This application was adverse by appellant (Mares) upon his location of the Gold Hill lode claim. Appellant brought suit, in support of his adverse claim, within the time allowed by the statutes of the United States. The action was tried in the court below, and judgment was entered against respondent. At the trial evidence was introduced tending to show, and the jury found, that the discovery vein in the Gold Hill claim departed from the south side line thereof at a point about 400 feet from the southwest corner of the claim, and the court by its judgment held appellant's location valid only to the extent of 1,100 feet in length, thus cutting off 400 feet from the westerly end of the claim. From this judgment, and an order taxing costs, appellant appeals.

This is an appeal by the opposite party in the same case, this day decided by this court. (*Mares v. Dillon, ante*, page 117, 75 Pac. 963.) The plat brought up in the record disclosed the conflict between the Black Eagle claim and the Gold Hill claim to be very small, and the judgment of the court below found against the validity of the Black Eagle claim.

The first question for decision is, did the court err in holding that the westerly 400 feet of the Gold Hill location should be cut off? We are of the opinion that it did. The only part of the surface ground of the Gold Hill location affected by this suit is that part which is in conflict with the surface of the Black Eagle location, and therefore the court below had no jurisdiction to determine any matters with reference to any part of the location other than that embraced in such conflict. A judgment

in favor of the validity of the Gold Hill location as against the Black Eagle could only apply and be effective as to such area. Upon filing a certified copy of the judgment roll, appellant would be entitled to a patent to such area only. If he desired to acquire a patent to the remainder of his location, he would be compelled to make an original application therefor, and comply with the United States statutes and the rules and regulations of the land office. (2 Lindley on Mines, (2d Ed.) Sec. 765.)

By the judgment the Black Eagle location is denied validity, and the record does not disclose that any person claims any rights in conflict with the surface area of the Gold Hill location. Appellant is therefore *prima facie* the owner of the entire location as marked on the ground, as against every one except the United States, and if he complies with the acts of congress he has the right of possession to the entire claim, even as against the United States. If he should make application for patent upon the entire claim, the land department would have jurisdiction to inquire into the question of the extent of his location, and its determination, in the absence of fraud and bad faith on the part of its officers, would be conclusive. If it should determine to patent the entire claim to the appellant, no one not having a claim to some part of the surface included within these boundaries could be heard to object. If the land department should refuse to patent the entire surface ground, its decision in this regard would be equally conclusive. The amount of surface ground included in the location, and its character, being matters exclusively within the jurisdiction of the land department of the United States, to be exercised when application is made for patent to the claim, and the court below being without jurisdiction to determine the question of the extent of the surface location outside the area in conflict with the Black Eagle, there was error committed in the action of the court below complained of. We therefore do not consider or decide the question as to the validity or invalidity of the Gold Hill location as to any ground not in conflict with the Black Eagle location.

The judgment entered by the court below decreed that appel-

lant (Mares) was entitled to the possession of the east 1,100 feet of the Gold Hill claim, specifically describing the same. This judgment is erroneous. As said above, the only question to be tried by the court below was who, if either, of the parties was entitled to the possession of the area in conflict which is specifically described in the complaint? Under the judgment as rendered, appellant might present a certified copy of the judgment roll and demand a patent for the entire east 1,100 feet of his claim. The plat attached to the record in the case, and the description set forth in the complaint, show distinctly that the area in conflict was much less than the judgment finds appellant entitled to the possession of. In our opinion, the court below should be ordered to modify its decree so as to determine that the appellant is entitled to the possession of simply the ground in conflict, as described in the complaint.

Appellant also appealed from an order taxing costs, by which the court disallowed the following items: Ten dollars, land office fees for filing adverse in the land office; \$40 paid A. S. Hovey for surveying the ground in conflict, and making a plat for the land office; and \$5 paid to the county clerk for abstract of title for use in the land office. None of these items come within the provisions of Section 1866 of the Code of Civil Procedure. None of them were paid out or expended for matters to be used in the trial of the case below; all of them were paid out for the purpose of enabling appellant to complete his adverse claims filed in the land office. The money thus paid was not for the procurement of anything necessary to the maintenance of the suit, but only necessary to the filing of the adverse, which is entirely separate from and preliminary to the actual suit. All these items must therefore be disallowed.

Appellant in his notice of appeal specifies that the judgment is appealed from, and also an appeal "from said judgment as modified by the order of said district court made and entered on the 28th day of December, A. D. 1901, retaxing the costs in said action." Under the decisions of this court, an appeal does not lie from an order taxing costs, but the error, if any,

may be considered on appeal from the judgment. (*Montana Ore Purchasing Co. v. Boston & Montana Consol. C. & S. Mining Co.*, 27 Mont. 288, 70 Pac. 1114; *Murray v. Northern Pacific Ry. Co.*, 26 Mont. 268, 67 Pac. 625.)

We advise that this court direct the court below to modify the judgment appealed from, so that it may determine that the appellant is entitled to the possession of the area in conflict, and specifically describe the same as set forth in the complaint.

PER CURIAM.—For the reasons stated in the foregoing opinion, this cause is remanded to the district court with directions to modify the judgment so as to make it conform to the views expressed in the opinion, and that, when so modified, it be affirmed.

LARGEY, RESPONDENT, v. LEGGAT, APPELLANT.

(No. 1,780.)

(Submitted March 7, 1904. Decided March 21, 1904.)

Partition Sale—Purchaser as Trustee—Evidence of Trust—Pleadings and Findings — Verbal Agreement — Merger in Written Contract—Attorney in Fact—Signature to Contract—Effect as to Liability—Specific Performance—Statute of Frauds.

1. Civil Code, Section 2186, provides that the execution of a contract in writing, whether required to be in writing or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied its execution, and hence evidence of negotiations and conversations immediately preceding the execution of a written contract is incompetent to show an agreement concerning its matter made by one claimed to be bound thereby.
2. One who signs a contract only as attorney in fact for a party thereto is not bound by the contract, and it has the same effect, so far as an action against him based thereon is concerned, as if the party had signed only his own name thereto.
3. By agreements between defendants in partition and L., the latter agreed, by himself or agent, to buy in the property at the sale in his own name,

and hold it for the former, to whom he was to reconvey the same, or a part thereof, as he should elect, on being reimbursed for the cost and expenses. One agreement was signed for one of the defendants by an attorney in fact, who afterwards bought the property at the sale in his own name, but who did not otherwise sign either agreement. *Held*, that the agreements did not establish a trust relation between the purchaser and L., who claimed that the property was bought for him.

4. Pleadings alleging that a trust relation was created between parties in question by virtue of written agreements do not support conclusions of law declaring a party to be a trustee *ex maleficio*.
5. Where it cannot be determined from either the pleadings or the evidence as to a contract to purchase property for another at a partition sale whether the purchaser was to furnish the money or not, or whether he was to take the deed in his own name or otherwise, neither would support a decree for specific performance on the part of the purchaser.
6. An oral agreement by a purchaser at a judicial sale to take the deed in his own name, and convey to another, is void, as within the statute of frauds (Civil Code Section 2342).
7. The agreement cannot be taken out of the statute, and enforced against the purchaser as a trustee *ex maleficio*, to prevent the perpetration of a fraud, where neither party had any interest in the property, and no money was advanced to the purchaser, or anything done towards carrying the agreement into effect.
8. Findings not within the issue made by the pleadings will not support a decree.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

SUIT by P. A. Largey against John B. Leggat. Before the trial plaintiff died, and Lulu F. Largey, his administratrix, was substituted; and from a decree in favor of the latter, and from an order denying a new trial, defendant appeals. Reversed.

STATEMENT OF THE CASE.

P. A. Largey brought suit in the district court of Silver Bow county to have the defendant declared to be a trustee, and to hold in trust for the use and benefit of plaintiff certain mining property, known as the "Gray Eagle Fraction Lode Claim," and to compel conveyance of such property to him.

The complaint alleges that in 1896 plaintiff, Largey, entered into a contract with O'Rourke, Clark and Ruth F. Leggat, three owners in the Gray Eagle claim, by the terms of which he agreed that he would attend a partition sale of that property, which had been ordered by the court in an action entitled "*Mur-*

ray v. *Clark et al.*," and, in the event no bid was made on the property in excess of \$7,000, he would, individually or by his agent, bid in the property, and pay for it with his own funds, taking the title in his own name, in trust, however, for the parties, O'Rourke, Clark and Ruth F. Leggat; that in pursuance of such contract he (plaintiff) entered into an agreement with defendant, John B. Leggat, by the terms of which defendant agreed to attend such sale and make bid for and purchase said property as the agent of plaintiff; that, relying on the agreement with defendant, plaintiff did not attend the sale or make other arrangements; that defendant attended the sale and purchased the property for \$5,500, and such sale was confirmed; that defendant then repudiated the agreement referred to above, and claimed that he acted for himself in purchasing the property, took the deed therefor in his own name, and threatens to sell the property; and that plaintiff tendered to defendant the purchase price of the property. The prayer is that defendant be enjoined from disposing of the property; that he be adjudged to be a trustee, and to hold the same for the use and benefit of the plaintiff, and be required to make conveyance thereof.

To this complaint defendant filed an amended answer, which denies that defendant ever entered into any agreement with plaintiff to act as his agent, or to attend the partition sale, or to bid in the property for plaintiff, and denies that plaintiff was not represented at such sale, but avers that plaintiff did have a representative at the sale, who bid on the property for plaintiff. The answer then alleges that no agreement *in writing* was ever executed between plaintiff and defendant whereby defendant agreed to act for or as agent of plaintiff, or ever agreed to attend such sale, or bid on or purchase said property for plaintiff, or make any conveyance of such property to plaintiff.

In reply, plaintiff denies that no contract in writing was ever made, but alleges that two such contracts were entered into by defendant with plaintiff relative to the sale and bidding in of said property, whereby a relation of trust and confidence was created between plaintiff and defendant, and whereby defendant

was bound not to act in hostility to plaintiff in bidding on said property.

The cause was tried to the court without a jury, and at the conclusion of the trial the court made certain findings of fact and conclusions of law, and entered a decree against defendant. A motion for a new trial was made and overruled, and from the decree and order overruling defendant's motion for a new trial he appealed.

Before the trial, P. A. Largey died, and his administratrix was substituted.

Messrs. Carpenter, Day & Carpenter, for Appellant.

Messrs. McBride & McBride, and Mr. Bernard Noon, for Respondent.

MR. JUSTICE HOLLOWAY, after stating the case, delivered the opinion of the court.

Notwithstanding the purpose of the action, so far as indicated by the prayer of the complaint, it is very apparent from the pleadings that the only issues raised were: (1) Did plaintiff and defendant enter into an agreement whereby defendant promised to act as agent for the plaintiff in attending the partition sale, or in bidding for or purchasing the property in controversy? (2) If such agreement was made, was it in writing? And (3) if in writing, did it constitute defendant a trustee of the plaintiff?

In support of his contention, plaintiff offered in evidence the written agreement entered into between himself and O'Rourke, H. S. Clark and Ruth F. Leggat. This agreement, after reciting that a suit in partition had been commenced by James A. Murray and others, who were owners of 9-56 of the Gray Eagle fraction lode claim, against O'Rourke, Clark and Ruth F. Leggat, who were the owners of the remaining 47-56; that a decree in partition had been rendered; and that a sale of the property had been ordered for June 12, 1896, at 2 o'clock p. m.—then

provides that Largey should attend the sale, in person or by agent, and not permit the property to be sold to any one else for less than \$7,000; that, in the event Largey's bid for any sum less than \$7,000 should be accepted, he should advance the money necessary for paying for the interest in the property owned by Murray and his co-plaintiffs in the partition suit; that the deed for the entire property should be taken by Largey in his own name; that he should then have one year in which to elect whether or not he would retain for himself the 9-56 interest formerly owned by Murray and others, and, in the event he did so, O'Rourke, Clark and Ruth F. Leggat were to repay to Largey their proportionate shares of the cost and expense, with interest at the rate of one per cent. per month, and, in the event he did not so retain that interest, then O'Rourke, Clark and Ruth F. Leggat were to pay the amount of the purchase price of such property, together with costs and expenses, and interest thereon, and, in either event, receive deeds for their respective portions of the property. The foregoing are the only provisions of the contract material to this controversy.

This agreement was entered into on the 12th day of June, 1896, about 12 o'clock noon, and was signed by Largey, O'Rourke, H. S. Clark and Ruth F. Leggat, by John B. Leggat, her attorney in fact; John B. Leggat being the defendant in this action. Over the objection of defendant witnesses were permitted to testify on behalf of the plaintiff to certain negotiations and conversations had at the meeting on June 12th, when this contract was entered into, but before it was executed, to the effect that the parties, O'Rourke, one McConville, who seems to have had some interest in the same share as that represented by O'Rourke, and H. S. Clark, agreed among themselves that defendant, Leggat, should attend the partition sale and bid for the property for the use and benefit of all of them and of Largey, and that Largey also agreed to this arrangement; that after this agreement was finally concluded, the foregoing written agreement was executed. Defendant now complains that all of this testimony was incompetent, for the reason that whatever

conversation was had or verbal agreement made were merged in the written contract executed thereafter, and in this we think the defendant is correct. Section 2186 of the Civil Code provides: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." Disregarding this incompetent testimony, then, we observe that there is nothing whatever in the written contract of June 12, 1896, which binds the defendant, Leggat, to do anything. In fact, the agreement is not signed by Leggat. The mere fact that the signature appears, "Ruth F. Leggat, by John B. Leggat, her attorney in fact," does not bind the defendant in this action at all. The agreement has the same effect, so far as this action is concerned, as if Ruth F. Leggat had signed her own name, and none other.

Plaintiff also offered in evidence what is designated in the record as the supplemental agreement, which is a mere memorandum in writing, signed by P. A. Largey only, whereby Largey agreed that in the event his bid for the property should be accepted, and he should not elect to retain for himself the 9-56 Murray interest, then he would execute to Ruth F. Leggat a deed for the 9-56 which she then owned, and her proportionate share of the 9-56 Murray interest, upon her paying to Largey her proportionate share of the purchase price, costs and expenses, and that in no event should Ruth F. Leggat be held to assume any part of the 9-56 Murray interest over and above her pro rata share thereof. The purpose of the execution of this agreement is not apparent; neither is its materiality in the trial of this cause.

There is some testimony in the record which tends to show that, prior to June 12th, Leggat had agreed with Largey that he would attend the sale and represent Largey in bidding for and purchasing the property; that he also suggested that one Morgan should also attend the sale and bid in conjunction with him. Leggat denies that he ever entered into any agreement

with Largey whatever, but says that Largey selected Morgan to act for him at the sale, and that he (Leggat) informed Largey that he intended to bid for himself at such sale. The testimony is undisputed that Leggat, Morgan and Will. L. Clark, private secretary to P. A. Largey, all attended the sale; that both Morgan and Leggat made bids for the property; that Leggat's bid for \$5,500 was accepted as the highest bid; that after the sale Leggat paid to the referee ten per cent. of the purchase price required by the order of sale; that Largey offered to pay this money himself, but his offer was declined by Leggat; that afterwards, and before the commencement of this action, Largey made tender of the whole amount of the purchase price to Leggat, and also to the referee, and demanded from each that the deed be made to Largey, which offer was declined, and demand refused.

Upon this evidence the court made a large number of findings of fact. After finding the respective interests of the parties in the property prior to the date of the sale, and the fact of the impending sale, and execution of the agreement between Largey, O'Rourke, Clark and Ruth F. Leggat, the court finds (4) that the parties to that agreement selected defendant, John B. Leggat, to attend the sale and to bid in the property for the use and benefit of all the parties to that agreement, and that Leggat agreed to attend the sale as agent of Largey, and to bid on the property for the use and benefit of all the parties to that agreement; (5) that Leggat arranged with Morgan to attend the sale and in conjunction with him bid for the property for the benefit of the parties to such written agreement; (6) that Moran and Leggat did attend the sale, and did bid for the property for the use and benefit of all the parties to said written agreement; that Leggat's bid of \$5,500 was accepted, and that Leggat then and there paid to the referee, for the use and benefit of the parties to said written agreement, ten per cent. of his bid, to-wit, \$550; (7) that Leggat, in violation of his agreement to act for, and bid in the property for the use and benefit of the parties to the written

agreement, took the deed in his own name; (8) that, before the deed was executed, Largey, for the use and benefit of all the parties to said written agreement, tendered to the referee the purchase price of the property, which was refused; and (9) that he likewise tendered the amount to John B. Leggat, which was refused. The court then finds the respective interests of O'Rourke, H. S. Clark and Ruth F. Leggat, and concludes with finding No. 19, which is as follows: "That the allegations and averments of plaintiff's complaint are true, and all the denials and allegations of defendant's answer are untrue."

As conclusions of law, the court finds that, at the time that Leggat bid for the property in controversy, he was the agent of, and as such occupied a fiduciary relation towards, P. A. Largey, O'Rourke, Clark and Ruth F. Leggat; that it would be inequitable to permit Leggat to make use of his agency for the purpose of depriving his principals of their property, and securing it for himself; that Leggat became, and is now, a trustee *ex maleficio*, and by reason of said trust holds the title he obtained by the referee's deed for the use and benefit of Largey, O'Rourke, Clark and Ruth F. Leggat; and that the plaintiff, as the trustee of the express trusts set out in the written agreement made between Largey, O'Rourke, Clark and Ruth F. Leggat, is entitled to a judgment and decree directing the defendant, Leggat, to make, execute and deliver to the plaintiff a deed for the property in controversy.

The findings are not supported by the pleadings, and, if the incompetent testimony be disregarded, are not supported by the evidence. If the purpose of this action is to have the defendant declared to be a trustee of the plaintiff, then the pleadings do not sustain the findings or decree. The reply, which is the only pleading containing any allegations which would tend to show that defendant became such trustee, alleges that such relationship was constituted by virtue of two written agreements. The only agreements offered in evidence were the original agreement between Largey, O'Rourke, H. S. Clark and Ruth F. Leggat, and the supplemental agreement between Largey

and Ruth F. Leggat, neither of which was signed by the defendant, and neither of which mentions him or assumes to bind him to do anything; and, giving them their broadest significance, they fall far short of establishing or tending to establish the relationship of trustee and *cestui que trust* as between Leggat and Largey.

As one of the conclusions of law, the court declared the defendant to be trustee *ex maleficio*, and that he holds the property in controversy in trust for the plaintiff, O'Rourke, Clark and Ruth F. Leggat; but such a conclusion has no support in the pleadings whatever. It may be a fact that defendant obtained certain information, from his being present with those parties, which, in equity and good conscience, he should not be permitted to make use of for his own benefit; but there is no allegation whatever in the complaint that defendant did any such thing, or that he was in fact present with the other parties named, or obtained any information from them, or that any relationship of trust or confidence could have been created between them. As we have said, the only allegations with reference to that subject are found in the reply, and those allegations are that the relationship of trustee and *cestui que trust* was created between Leggat and Largey by virtue of two written agreements; and, as we have observed, those agreements show nothing of the kind whatever.

At most, the competent testimony tends to show that, by oral agreement, Leggat undertook to act as agent for Largey in attending the sale and in bidding for the property, and that testimony tends to support the theory of the plaintiff as disclosed by the pleadings. But neither the pleadings nor this evidence would support a decree for specific performance, for the reason that the terms of the contract are too indefinite. It cannot be determined whether Largey was to furnish the money, or whether Leggat was to do so—whether Leggat was to take the deed in the name of Largey, or in his own name and transfer the property to Largey. If the contract was that Leggat was to take the deed in his own name and convey to Largey, then it

is void, as within the statute of frauds. (Section 2342, Civil Code; *Bauman v. Holzhausen*, 26 Hun. 505.)

Cases may be found where the contract has been taken out of the statute of frauds, to prevent the perpetration of a fraud, where one who has an interest in land which is about to be sold agrees with another that the other shall bid the property in, and hold it as security for money advanced, and that agreement has been consummated, or, in other instances, where there has been a part performance of the verbal agreement. And there are cases in which persons somewhat similarly situated as the defendant in this case have been made trustees *ex maleficio* of the property which they purchased at sales pursuant to parol agreements with others who were the owners, or had some interest therein, to buy for such persons' benefit. But in these cases the parol agreement was taken out of the statute of frauds to prevent the accomplishment of a fraud, whereby the owner of the whole or some interest in the property would be deprived of such interest, which it was the object of the parol agreement to protect. (*Bauman v. Holzhausen*, *supra*.) But in this instance neither Largey nor Leggat had any interest in the property. Largey advanced no money—in fact, did nothing towards carrying the verbal agreement into effect. Upon this subject the Supreme Court of New York said: "But no case can be found where a contract has been taken out of the statute, in favor of a party who had no existing interest in the property, who had done no act of part performance, who had parted with nothing under the contract, simply upon the ground that the other party was guilty of a fraud in refusing to perform his verbal agreement. That is all there is of this case, except the offer of performance by the plaintiff. To hold that to be sufficient to take the case out of the statute would repeal it. Care must be taken that this is not done under an idea that, as the statute was enacted to prevent fraud, it cannot be applied to cases where it appears that, in a moral sense, a party is attempting to perpetrate a fraud. A party in no legal sense commits a fraud by refusing to perform a contract void by its provisions.

He has not, in that sense, made a contract, and has a perfect right, both at law and in equity, to refuse performance." (*Levy v. Brush*, 45 N. Y. 589.) At most, the complaint alleges, and the proof tends to show, only a violation of a parol agreement on the part of an agent; and the one gives rise to, and the other supports nothing more than, an action for damages for the breach of such contract, and this is not such an action.

The findings are not within the issues made by the pleadings, and will not support a decree. (*Dutro v. Kennedy*, 9 Mont. 101, 22 Pac. 763; *Harris v. Lloyd*, 11 Mont. 390, 28 Pac. 736, 28 Am. St. Rep. 475.) If it be said that finding No. 19, above, is responsive to the issues, then, as observed before, the evidence is insufficient to support that finding, even assuming that the terms of the contract are pleaded with sufficient certainty.

The judgment and order are reversed, and the cause remanded, with directions to the district court to set aside the findings heretofore made, and to enter judgment for defendant for costs.

Reversed and remanded.

30	158
31	467

30	158
136	104

MALONEY ET AL., RESPONDENTS, v. KING ET AL.,
APPELLANTS.

(No. 1,812.)

(Submitted March 3, 1904. Decided March 29, 1904.)

Mines—Removal of Ore — Action for Damages—Burden of Proof—Rebuttal—Statutes—Instructions—Defenses.

1. The owner of a mining claim is entitled *prima facie* to everything beneath the surface of his claim, and under such title may prevent the intrusion of any one not showing a paramount right to enter within the planes of his boundaries.
2. Code of Civil Procedure, Section 1080, as amended by Session Laws of 1901, p. 160, provides that the party on whom the burden of the issues rests must first produce his evidence, and the adverse party must then produce his evidence, and that the parties will then be confined to rebutting evidence. In an action by the owners of a mining claim for removal of ore from within its boundaries, the issue was the location of the point at which a certain vein departed from a side line of defendant's location. Defendants, after plaintiffs showed a taking of ore from within their boundaries, introduced evidence that the vein departed at the point as claimed by them, whereupon plaintiffs in rebuttal introduced evidence that the vein departed at the place claimed by them as shown by the fact that the vein was exposed in the cellar of a certain building. *Held*, that it was error not to permit defendants to show in rebuttal that the vein located in the cellar was along a course or strike which would bring it out at a point other than claimed by plaintiffs.
3. In an action for damages sustained by plaintiffs, owing to defendants having removed ore from within the boundaries of plaintiffs' location, an instruction that if defendants had carried away ores belonging to plaintiffs, and in so doing they were mixed with other ores to which defendants were entitled, so that the amount of each could not be ascertained, plaintiffs were entitled to recover the value of all ores taken with which the ores belonging to plaintiffs were mixed, was erroneous.
4. In an action for damages sustained by plaintiffs owing to the removal of ores from their mining location, plaintiffs having shown *prima facie* the amounts taken, it was then incumbent on defendants to show that they took a less quantity than plaintiffs' proof tended to show.
5. Code of Civil Procedure, Section 1081, provides that when, in the opinion of the court, it is proper for the jury to have a view of the property which is the subject of litigation, it may order them to be conducted there. *Held*, that the view is within the trial court's discretion.
6. Discretion of court in granting a view of premises will not be reviewed on appeal, in the absence of a clear showing of error.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

ACTION by James H. Maloney and others against Silas F. King and others. From a judgment in favor of plaintiffs, and from an order denying a motion for a new trial, defendants appeal. Reversed.

STATEMENT OF THE CASE.

The Plymouth lode mining claim is owned by plaintiffs. When the action was commenced the Silver King lode mining claim was owned by defendants King, Murray and Daly.

Daly having died, the defendant Margaret Daly, as administratrix of his estate, was substituted for him. Defendants Sutton and Talbot were operating the Silver King under a lease. The Plymouth lies south of the Silver King. The plaintiffs by this action seek to recover of the defendants a judgment for \$50,000, the value of ores alleged to have been wilfully, knowingly and unlawfully mined, extracted and carried away by defendants, and to obtain an injunction restraining them from entering upon that part of the Plymouth which lies east of a vertical plane passing through a point on the north side line of the claim 405 feet distant from the northeast corner of the claim, the plane extending south seven degrees west across and vertically downward through the Plymouth claim; and from mining, carrying away or converting to their own use the ores and minerals therein.

The defendants deny that they have mined, extracted, taken out or carried away from beneath that portion of the Plymouth claim described in the complaint, any ores or minerals belonging to the plaintiffs; and aver that the defendants Daly, Murray and King are the owners of the Silver King claim; that the apex of the vein from which the defendants took the ore in question is wholly within the surface boundaries of the Silver King, extending in an easterly and westerly direction for the entire length of that portion of the Silver King which lies north of and adjacent to that portion of the Plymouth claimed by the plaintiffs, and say that the only drifts or levels run by the defendants which extend beneath the surfact of the Plymouth vein have been run by defendants on said vein, and not otherwise; and deny that plaintiffs are now or ever have been the owners of any part of said vein, or that it is or ever has been a part of the Plymouth.

The vertical plane above described will be hereafter referred to as the injunction line. Upon the trial the jury found for the plaintiffs, whereupon the court entered judgment and decree in their favor. From the judgment and an order denying their motion for a new trial defendants have appealed.

Messrs. McBride & McBride, Mr. William Scallon, and Mr. James E. Murray, for Appellants.

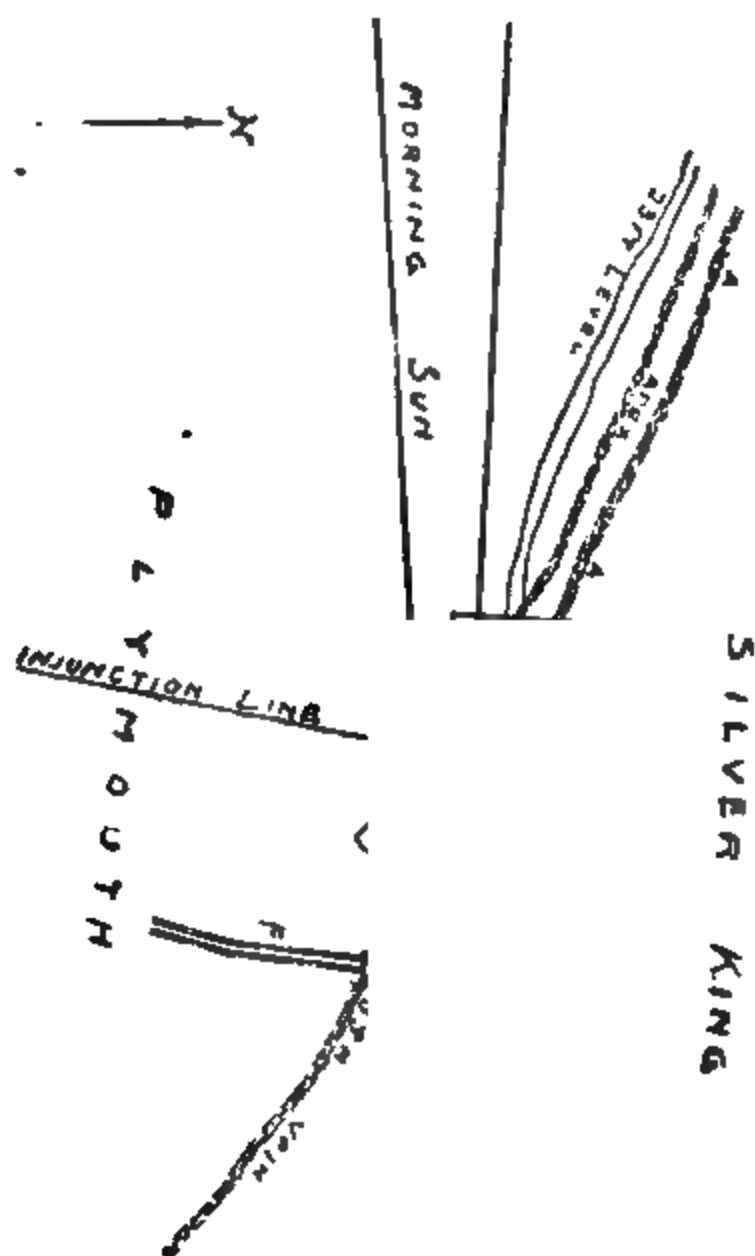
Mr. C. P. Drennan, and Mr. John J. McHatton, for Respondents.

MR. COMMISSIONER CALLAWAY prepared the statement of the case, and also the following opinion for the court:

1. Being the owners of the surface ground described in their complaint, the respondents were *prima facie* entitled to everything beneath the surface of their claim, and under such *prima facie* title could prevent the intrusion of any one not showing a paramount right to enter within the vertical planes of their boundaries. (*Maloney v. King*, 25 Mont. 188, 64 Pac. 351; 27 Mont. 428, 71 Pac. 469; *Parrot Silver & Copper Company v. Heinze*, 25 Mont. 139, 64 Pac. 326, 53 L. R. A. 491, 87 Am. St. Rep. 386; *Boston & Montana Consolidated Copper & Silver Mining Company v. Montana Ore Purchasing Co.*, 188 U. S. 632, 23 Sup. Ct. 434, 47 L. Ed. 626.)

Respondents' ownership of the surface ground of the Plymouth lode mining claim not being controverted, they, in order to make out a *prima facie* case, merely gave evidence tending to show that the appellants had willfully, knowingly and unlawfully extracted and carried away large quantities of ore, of great value, from within the vertical planes of the boundaries of that portion of the Plymouth described in their complaint, and rested. Appellants then sought to justify the taking of the ore by showing that it was taken from a vein which has its apex in the Silver King ground. Much testimony was introduced to prove this contention. A model and numerous maps were produced as explanatory of appellants' theory. Appellants having rested, respondents sought to obviate the showing made by appellants, and on their part introduced a large number of maps. In order to make clear the contentions of the parties

reference is made to the following diagram, which, though not technically correct, will serve for illustrative purposes:



Appellants claim that the apex of the vein from which the ore was taken is exposed throughout the entire length of their

surface drift, and say that the so-called Plymouth vein is merely a spur thereof, which, in any event, does not pass beyond the Silver King south side line until it reaches a point somewhat over forty feet east of the point where the injunction line intersects the south side line. Respondents, on the other hand, claim that their Plymouth vein is the main vein.

In passing it is well to remark that the discovery vein in the Silver King seems to lie north of the veins mentioned, and is not involved in this discussion.

Respondents insist that the Plymouth vein departs entirely from the south side line of the Silver King at the injunction line; in other words, it is contended that the foot wall of the vein departs exactly where the injunction line crosses. In order to demonstrate this theory respondents' witnesses testified that the apex of the Plymouth vein—a vein between two and three feet in width at the apex—is disclosed in three places within fifty feet; that the hanging wall is exposed in the southwest corner of a cellar (marked "B" on the diagram), beneath the house (marked "C") immediately west of the Robinson raise (marked "D"), in the top of the engine room raise (marked "E"), and at the top of and in the western portion of the Plymouth shaft (marked "F"). As one of the witnesses testified, "Actually locating these three points, and placing a straight edge thereon, and they exactly line up."

No reference was made to the course of the Plymouth vein in respondents' case in chief. The first testimony concerning the vein disclosed in the cellar was adduced in their testimony in rebuttal of appellants' case. When respondents again rested appellants offered to prove that the hanging wall of the apex of the vein exposed in the cellar of the house represented on respondents' map, Exhibit L, and referred to in the testimony of respondents' witnesses, is nine feet north of the position of the apex at said point as testified by said witnesses, and is nine feet north of the location of the foot wall as represented by the map. This vein is represented by the line marked "A, A." They further offered to prove that the apex of the vein exposed

in the cellar is six feet in width, the foot wall thereof being twelve feet further north than testified to by respondents' witnesses, and twelve feet further north than is shown on respondents' map; that the apex as exposed in the cellar is directly over the eastern portion of appellants' "23 foot upraise" (marked "G, G"), immediately east of where the apex connects with the Silver King surface drift; and that the course and strike of the apex as exposed in the cellar is about south 72 degrees east, and if continued on its strike would depart from the Silver King at a point $44\frac{1}{2}$ feet east, measured along the south side line of the Silver King lode claim, from the point where the injunction line crosses said south side line, or, approximately, at the point marked "X" in the diagram. The "23 foot upraise" referred to is a connection between the surface drift, which is about 12 feet below the surface, and the "23 foot level," which is 23 feet below the surface, and this explains the apparent curvature of the upraise as shown on the diagram. Appellants further offered to prove that they had no knowledge of the existence of any cellar under said house, or of any apex exposed therein, prior to the time that they heard the testimony of the witnesses on behalf of plaintiffs. The court sustained an objection to this offer, and refused to allow the defendants to put in any further testimony.

It is readily seen that the crucial point in the case was, at what point does the so-called Plymouth vein depart entirely from the south side line of the Silver King claim? Respondents claim that it departs entirely at the injunction line, which is at a point between the cellar and the engine room raise. Appellants, on the other hand, claim that it departs approximately at the point marked "X." Quartz veins in their strike across the country usually follow a somewhat irregular course. In order to show definitely the course of the Plymouth vein, and to demonstrate the exact point at which it crosses the south side line of the Silver King, it became important to prove its course or strike, and hence respondents attempted to show its appearance on both sides of the south side line, and on either side of

the point where the injunction line intersects the south side line. One of these points of appearance was in the engine room raise and the other was in the cellar. The exact location of the vein in the cellar, therefore, became material.

We think the court should have admitted the evidence. Appellants could not reasonably have anticipated that respondents would in their case in rebuttal give testimony concerning the disclosure of a vein in the cellar. The cellar was covered by a house, and it was therefore not the subject of ordinary observation. We cannot see how it can be said that appellants should have known of the disclosure of the vein in the cellar prior to the time respondents gave testimony concerning it. The testimony offered would have tended, in some degree at least, to rebut respondents' theory, and appellants had the right to do that if they could.

Section 1080 of the Code of Civil Procedure, as amended (Session Laws 1901, p. 160), prescribes: "When the jury has been sworn, the trial shall proceed in the following order, unless the court, for good cause and special reason, otherwise directs: * * * (3) The party on whom rests the burden of the issues must first produce his evidence; the adverse party will then produce his evidence. (4) The parties will then be confined to rebutting evidence, unless the court for good reasons, in furtherance of justice, permits them to offer evidence in their original case."

After respondents had made out their *prima facie* case, as above noted, the burden was on the appellants. They sought to justify their asportation of the ore by showing their ownership of the vein from which it was taken, and offered evidence to show the course or strike of the vein. Then, the respondents, being in the position of defendants upon that issue, controverted the evidence of appellants, and gave evidence tending to show that they, the respondents, are the owners of the vein from which the ore was taken, and testified concerning its course or strike. The truth of this testimony was what appellants sought to disprove.

Had the appellants been able to prove their contention to the effect that the apex of the so-called Plymouth vein passes out of the south side line of the Silver King at a point $44\frac{1}{2}$ feet east of the injunction line, or at any point east of the injunction line, they would have proved either a complete or partial defense to respondents' action; for admittedly the appellants were the owners of all ores which they had extracted from the Plymouth claim at a point west of a plane passing through the point where the foot wall of the Plymouth vein departs from the Silver King, and drawn parallel with the west end line of the Silver King.

The burden being on appellants to prove that they were the owners of the vein from which the ore in question was taken, they were entitled to close the proofs on that issue, or, at least, to rebut any new matter set up by the plaintiffs. The correctness of this principle is illustrated in the case of *Lisman v. Early*, 15 Cal. 199. That was a suit on a note. The answer pleaded payment, and averred that money had been paid the owner of the note, which he promised to credit thereon. The court said: "We think the court erred in excluding the rebutting testimony of defendants, and we here remark that as the admission of evidence, even after the party has had an opportunity to offer it and has failed, is a matter of discretion, it is better for the court, whenever the ends of justice require it, to suffer the testimony to go in. But in this case the plaintiff offered the note sued on in evidence and rested. The defendant, not disputing the execution of the note, offered in evidence some receipts for the purpose of proving payment. To rebut this, the plaintiff offered proof tending to show that these payments applied to an open account against defendants. The defendants then proposed to show that there was no such account made or existing. We do not see how the defendants could anticipate this proof of the plaintiff in regard to the account, and to deny them an opportunity of rebutting it might be equivalent to a denial of a right to prove their defense. The burden of the proof was really on the defendants to prove payment under

the issue, and the defendants were entitled to close the proofs, at least to rebut any new matter set up by the plaintiff. See *Shepard v. Potter*, 4 Hill, 204; Cow. Treat. 992; Cow. & Hill's notes to Phil. Ev. 711, 718, and the cases cited in *Shepard v. Potter*, 4 Hill, *supra*." And see *Wade v. Thayer*, 40 Cal. 578; *Foote v. Richmond*, 42 Cal. 442; *Chamberlain v. Raymond*, 3 Utah, 117, 1 Pac. 850; 1 West Coast Rep. 522; *People v. Page*, 1 Idaho, 190; *City of Rock Island v. Starkey*, 189 Ill. 515, 59 N. E. 971; *Tathwell v. City of Cedar Rapids*, 114 Iowa, 180, 86 N. W. 291; *McLeod v. Lee*, 17 Nev. 103, 28 Pac. 124; *Comstock v. Smith*, 20 Mich. 338.

Respondents insist that appellants, in order to justify their taking of the ore, had the burden of proving the exact point at which the vein passes out of the south side line of the Silver King. Appellants assumed the burden of that issue, and under this view, therefore, had the right to open and close thereon. On the other hand, if, as respondents contend, they had the right to open and close the case because the taking of the ore is the gravamen of the action, then they are confronted with this rule, which is readily seen to be deducible from the statute and the foregoing authorities: When the respondents, in rebutting appellants' testimony, introduced in evidence a new, affirmative and material fact, which the appellants could not reasonably have anticipated, the latter should have been permitted an opportunity to rebut it, and the refusal of the court to allow them so to do amounted to an abuse of discretion.

2. The appellants complain because the court refused to admit in evidence a glass model proffered by them. Without entering into a discussion of the subject, it is sufficient to say that we think the court fully justified in taking the course it did.

3. Appellants, upon their application prior to the trial, were permitted to do considerable development work to show the actual conditions existing in the disputed ground. During the trial they asked permission to make a certain upraise, which they said would require but a short time, as the upraise would be only from five to ten feet in height, but the request was de-

nied by the court. As the case must go back for a new trial, it is unnecessary to pass upon the propriety of the court's action, as prior to that event appellants may ask the the court's permission to do the contemplated work.

4. As to the instructions. Appellants complain of instructions Nos. 18 and 19. The discussion of one will apply to both, and we therefore quote No. 19: "You are instructed that if you find from the evidence in this case that the defendants mined and carried away ores belonging to the plaintiffs from that portion of the Plymouth lode claim described in the complaint, and lying east of the line referred to in the evidence as the injunction line, and from a vein having its apex entirely therein, and that in mining and carrying away of said ores they were mixed with other ores taken from the workings west of said injunction line, or west of the portion of the vein which you may find from the evidence belongs to the plaintiffs, so that the amount and value thereof cannot be ascertained from the evidence, then you are instructed that *the plaintiffs are entitled to recover the value of all the ores shown to have been taken from beneath the surface of the Plymouth lode claim, with which said ores belonging to plaintiffs were mixed, and you are instructed to arrive at the value of the same upon the evidence and under the instructions of the court, and return your verdict in favor of the plaintiffs therefor.*" The italics are ours. This instruction is wrong, and prejudicial to appellants. Appellant Sutton, under whose immediate supervision the ore was extracted, testified that he took ore from both sides of the injunction line. Respondents were entitled to recover only the value of the ores taken by appellants from that portion of the Plymouth claim which lies east of the line passing through the south side line of the Silver King claim, where the apex in question departs entirely therefrom, and drawn parallel to the west end line of the Silver King. Respondents admit that appellants are entitled to the ores which lie west of said line, and which belong to the vein which has its apex in the Silver King. Respondents having proved in their *prima facie* case that ap-

pellants had taken away and converted to their own use a large quantity of ore of great value from that portion of the Plymouth which lies east of the injunction line, it was then incumbent upon appellants to avoid the showing made by the respondents. This they could do by proving that the ore was extracted from a vein which has its apex in the Silver King claim. While admitting that they did take ore from beneath the surface of the Plymouth, they could have shown, if such was the fact, that such ores as they took were from such portion of the Plymouth as lies west of the forbidden line; or, if they were unable to prove that they took all the ore extracted from the Plymouth west of the line, they were at liberty to have shown that they took a less quantity from respondents' ground than the latter's proof tended to show.

Respondents, in attempting to sustain the instruction under consideration, rely upon the cases of *St. Clair v. Cash Gold M. & M. Co.*, 9 Colo. App. 235, 47 Pac. 466, and *Little Pittsburg Con. M. Co. v. Little Chief Con. M. Co.*, 11 Colo. 223, 17 Pac. 760, 7 Am. St. Rep. 226. In the latter case it is said: "In the American note to the leading case of *Armory v. Delamirie*, 1 Smith, Lead. Cas. pt. 1, 679, the doctrine is broadly stated thus: 'When the nature of a wrongful act is such that it not only inflicts an injury, but takes away the means of proving the nature and extent of the loss, the law will aid the remedy against the wrongdoer, and supply the deficiency of proof caused by his misconduct, by making every reasonable intendment against him, and in favor of the person whom he has injured. A man who willfully places the property of another in a situation where it cannot be recovered, or its true amount or value ascertained, by mixing it with his own, or in any other manner, will consequently be compelled to bear the inconvenience of the uncertainty or confusion which he has produced, even to the extent of surrendering the whole if his share cannot be distinguished, or responding in damages for the highest value at which the property in question can reasonably be estimated'—citing *Lupton v. White*, 15 Ves. 432; *Hart v. Ten Eyck*, 2

Johns. Ch. 62, 108; *Ryder v. Hathaway*, 21 Pick. 298; *Clark v. Miller*, 4 Wend. 628; *Bailey v. Shaw*, 4 Fost. (N. H.) 297 [55 Am. Dec. 241]; *Perston v. Leighton*, 6 Md. 88."

The principle laid down in those cases is applicable to this only to this extent: Respondents, by measurements taken, proved that appellants had taken a large quantity of ore, of an estimated value per ton, from beneath that portion of the surface of the Plymouth claim described in their complaint. Presumably the appellants knew the exact amount and value of the ore taken by them from that particular ground. If, while admitting their taking of certain ores from the Plymouth ground east of the line, they failed to disprove respondents' testimony as to the amount and value thereof, having in their possession the means of disproving it, they cannot complain that the verdict against them is too large.

As said in Lindley on Mines, (2d Ed.) Sec. 668: "In an action for taking ore from a mining claim, the plaintiff labors under great difficulty in proving the exact amount of damages he has sustained, and the defendant has the means in his power of showing the correct amount of ore taken out; and if he neglects to do so he cannot complain that the jury, by their verdict, have fixed a large estimate upon the damages."

The instruction told the jury, in effect, that if the appellants took some ore which belonged to them, and some which belonged to respondents, and mixed the same, respondents could recover the value of the whole, unless appellants separated the same by testimony, and proved the amount which rightfully belonged to each. The principle of the instruction, carried to its logical result, might make appellants liable for vastly more ore than was ever extracted from respondents' ground, and cannot be supported.

In the first instance it was incumbent upon the respondents to make at least a *prima facie* showing of the amount of ore which appellants had extracted from the ground described in the complaint, and under no theory of the case could respondents recover more than the value of that amount of ore. If

appellants claim that a portion of the ore which respondents say the appellants took away was in fact extracted from some place other than the ground in dispute, that was a matter of defense which it was for the appellants to prove.

Appellants also urge that the court erred in using the following language in instruction No. 1: "The defendants further admit that at the time this action was commenced they were engaged in mining and extracting ores from that portion of the Plymouth lode claim described in the complaint." It is true that the language quoted is somewhat inaccurate. If this sentence had read: "The defendants further admit that at the time this action was commenced they were engaged in mining and extracting ores from beneath the surface of that portion of the Plymouth lode claim described in the complaint," the instruction would have been correct. Properly speaking, if appellants took ore from their own vein, which dipped beneath the surface of the Plymouth, they took no portion of the Plymouth, but only what was their own. This suggestion is also applicable to a number of other instructions given. However, when they are all read together, it is apparent that the jury could not have been misled by the language employed.

5. At the close of appellants' testimony they requested the court to allow the jury to inspect the ground and workings in controversy, for the purpose of giving the jury an opportunity to determine for themselves the real facts in the case. The court refused the desired permission. Section 1081, Code of Civil Procedure, provides: "When, in the opinion of the court, it is proper for the jury to have a view of the property which is the subject of litigation, or of the place at which any material fact occurred, it may order them to be conducted, in a body, under the charge of an officer, and one person representing each party, to the place, which shall be shown to them by the persons appointed by the court for that purpose. While the jury are thus absent, no person, other than the persons so appointed, shall speak to them on any subject connected with the trial, and such persons shall not speak to the jury upon any matters con-

nected with the subject of the action, but may point out to the jury the property in litigation, or the place at which any material fact occurred." The language of the section leaves the question whether the jury shall be allowed to inspect the premises in the discretion of the trial court, and its refusal to permit the inspection will not be reviewed by this court, in the absence of a clear showing of error. No such showing is made in this case. See *Klepsch v. Donald*, 4 Wash. 436, 30 Pac. 991, 31 Am. St. Rep. 936; *Andrews v. Youmans*, 82 Wis. 81, 52 N. W. 23; *Leidlein v. Meyer*, 95 Mich. 586, 55 N. W. 367; Jones on Evidence, Sec. 409; *People v. Fitzpatrick*, 80 Cal. 538, 22 Pac. 215.

6. The record in this case consists of over 1,200 printed pages, and appellants have assigned 79 specifications of error. We have given them all careful examination, and find that either there is no merit in them, or that the questions, other than those above discussed, are unnecessary to a decision of the case, and will not aid the court upon a new trial.

We are therefore of the opinion that the judgment and order should be reversed, and the cause remanded for a new trial.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order are reversed, and the cause is remanded for a new trial.

Rehearing denied May 2, 1904.

FLANNERY, RESPONDENT, v. CAMPBELL, APPELLANT.

(No. 1,817.)

(Submitted March 4, 1904. Decided March 29, 1904.)

Water Rights—Action for Unlawful Diversion—Pleading—Inconsistent Allegations—Judgments—Conclusiveness—Ap-

peal—Contradictory Instructions—Theory of Case—Estoppel.

1. A plaintiff cannot in a complaint take one position, and, in a replication to defendant's answer, take another one inconsistent with the allegations of the complaint.
2. In an action for the unlawful diversion of water by defendant, where plaintiff in her complaint admitted that defendant had allowed some of the water claimed by plaintiff to pass down to her, and that she had used it, she was not entitled to allege in her reply a plea of estoppel or *res judicata*, that defendant was estopped by his answer in a previous case, and by the judgment therein, from denying that plaintiff had been prevented from using any water.
3. In an action for the unlawful diversion of water, certain instructions reviewed and *held* erroneous, as inconsistent and contradictory.
4. Where an action was brought to determine the right of plaintiff's landlord to an interest in an irrigating ditch, to establish his right to use the ditch, and to enjoin defendant from interfering with plaintiff's use thereof, in which defendant denied the landlord's right to the ditch, but it was subsequently determined that he was a tenant in common thereof, and an order previously issued, restraining defendants from deflecting the flow, was modified so as to allow fifty inches of water to flow to the landlord's premises, such judgment was not conclusive, in a subsequent action by the tenant for damages to crops by reason of defendant's alleged previous diversion, that defendant had deprived plaintiff of all the water which should have been permitted to flow on her land.
5. Where plaintiff relied in the trial court on an estoppel arising from defendant's admission in his answer in another suit and not on the proposition that the judgment in such suit was determinative of such facts, she could not change her position on appeal, and claim that the judgment was conclusive as to the facts on which the estoppel was based.

Appeal from District Court, Gallatin County; W. L. Holloway, Judge.

ACTION by Ida B. Flannery against N. S. Campbell. From a judgment in favor of plaintiff, and from an order overruling a motion for a new trial, defendant appeals. Reversed.

Messrs. McConnell & McConnell, for Appellant.

Mr. Eugene B. Hoffman, and Mr. T. J. Walsh, for Respondent.

MR. COMMISSIONER CLAYBERG prepared the following opinion for the court:

Appeal from judgment and order overruling motion for a new trial. The action was instituted by respondent, Ida B.

Flannery (plaintiff), against appellant, N. S. Campbell (defendant), to recover damages to crops caused by the alleged deprivation by defendant of the use of water for irrigating purposes on plaintiff's crops during the irrigation season of 1898. The only two errors alleged are: (1) That the court gave inconsistent and contradictory instructions. (2) That the evidence wholly fails to sustain the verdict.

1. Contradictory Instructions. The condition of the pleadings is peculiar, and a somewhat extended reference thereto seems necessary to a full understanding of the case.

Plaintiff's complaint contains allegations which, briefly stated, are as follows:

(1) That one Pat Toohey owned certain land.

(2) That it was arid, and required irrigation.

(3) That there is appurtenant to said land a certain water right through the Flannery ditch, which was owned by defendant, Patrick Toohey, Joseph Davis and Benjamin Graham as tenants in common.

(4) That Toohey leased this land to the plaintiff.

(5) That she prepared the ground for seed, and planted certain crops.

“(6) That on or about the 7th day of July, 1898, and frequently thereafter during the irrigation season of 1898, defendant and said Joseph Davis, and each of them, wrongfully and unlawfully constructed dams and embankments in and near said Flannery ditch, and otherwise wrongfully and unlawfully interfered with and obstructed this plaintiff's use thereof, and the flow of the water therein, and plaintiff's use of the water right and water ditch hereinbefore mentioned; and by reason of said wrongful and unlawful acts, and the interference and obstruction of the said Davis and this defendant, plaintiff was able to obtain and did use only a small part of the water to which said land was entitled by virtue of the said water right, and, during the greater portion of said irrigation season, was able to and did obtain or use no part of said water for the irrigation of said crops or other purposes; and plaintiff was unable

to procure water from any other source with which to irrigate said crops, or any part thereof, and was unable to properly irrigate said crops, or any thereof, by reason of the said wrongful and unlawful acts and interference and obstruction by said defendant and said Davis with plaintiff's use of said water right and Flannery ditch; to plaintiff's great damage in the sum of eighteen hundred and eighteen and 90-100 (\$1,818.90) dollars."

In the seventh paragraph of the complaint she alleged specific damage to each of the crops which she had planted.

The defendant, in his answer to this complaint, denied generally or specifically all its material allegations, and in answer to paragraph 6, above quoted, says: "Defendant denies each and every allegation of paragraph 6, and alleges the truth to be as follows, to-wit: That on the 7th day of July, 1898, he turned the water out of said ditch, at the head thereof, for the purpose of enabling him to put in a gate at a point at which he diverted the water from the same for use upon his said ranch; this diversion was done jointly by this defendant and said Joseph Davis; that they put in said gate on said 7th day of July, 1898, and that on the following day they turned the water back into the ditch at its head or junction with the East Gallatin river, and allowed the said water to flow down said ditch; that this defendant never diverted or used any of the water until the 13th day of July, 1898, but that said Davis did divert and use the same for irrigating his crops upon his said ranch during the 8th, 9th, 10th, 11th, 12th and 13th days of July, 1898, and also a portion of it the 14th and 15th; that on the 15th day of July, 1898, Pat Toohey, who claimed to be the owner of the land, brought an action in the district court of Gallatin county against this defendant and said Joseph Davis, and enjoined them from using said water, and that the same was immediately turned back into the said ditch and allowed to flow down to the ranch or premises described in paragraph 1 of this complaint."

To this the plaintiff filed a reply, in the first part of which

she denies all the allegations of fact set forth in the answer, either specifically or generally, and then alleges, in substance, that defendant ought not to be permitted to deny that he prevented plaintiff from irrigating her crops, nor to make the allegations set forth in the sixth paragraph of his answer, because on the 15th day of July, 1898, Toohey instituted suit against said Campbell and one Davis, wherein he sought a decree enjoining Campbell and Davis from interfering with his water right; that in his complaint he alleged that Campbell and Davis had wrongfully and unlawfully constructed dams and embankments in the Flannery ditch so as to completely destroy Toohey's right to the use thereof, and that they had prevented any water flowing through the ditch, and had ousted him from the possession of the ditch; that Campbell and Davis filed their joint answer, which was verified by Campbell. Plaintiff then quoted paragraphs 6 and 7 of said answer, wherein the defendants denied that plaintiff had any right to the ditch, or any part thereof, or any right to the use of the water therein, and admitted that Campbell and Davis had prevented any water flowing in said ditch upon the lands, and had threatened to continue to do so unless restrained. That a temporary injunction was issued against Campbell and Davis from interfering with Toohey's right to the ditch; that afterwards a judgment was entered in said case, whereby it was adjudged that Toohey was the owner of the lands described in the complaint and in this suit, and was a tenant in common with Graham, Davis and Campbell in the Flannery ditch; that this defendant and Davis were each guilty of interfering with Toohey's right to said water, and that Toohey was entitled to injunction against them. She then alleges that the water and Flannery ditch, the real estate, and the interferences and obstructions mentioned in the complaint are the same as those in controversy in the *Toohey Case*, and that the defendant is the same Campbell who was a defendant in the *Toohey Case*; that at the time of the commencement of the injunction action, and during its pendency, and at the time of the commencement of this suit, plaintiff was

the lessee of Toohey, and of the land and water right herein. The replication closes with the following prayer: "Wherefore plaintiff says that defendant herein should be and is estopped from denying the title of said Toohey in said lands described in the complaint herein, and from denying the right and title of said Toohey to said water right mentioned in the complaint and answer herein, and from making any and all of the allegations of the sixth paragraph of said answer herein, and from denying that plaintiff was prevented from irrigating her said crops upon said real estate by him, the said defendant."

The complaint, as above stated, bases the right of action upon the unlawful diversion of water by defendant. Plaintiff did not plead or rely in her complaint upon the admissions in defendant's answer in the *Toohey Case*, or the judgment in that case, either as an estoppel or *res judicata*, but tendered an issue upon the fact of an unlawful diversion of the waters in question by the defendant. Defendant had a clear right to join issue on these allegations. Plaintiff had admitted by her complaint that defendant had allowed some of the water claimed by plaintiff to pass down to her, and that she had used it. This clearly appears from the following allegation, above quoted: "Plaintiff was able to obtain, and did use, only a small part of the water to which said land was entitled by virtue of the said water right." Defendant, in paragraph 6 of his answer, above quoted, meets the issues of paragraph 6 of the complaint, and alleges his version of the facts bearing thereon. In plaintiff's reply, above noted, she sought to plead an estoppel or *res judicata* against the facts set up in defendant's answer to the issue tendered by the complaint as above stated, claiming that this estoppel or *res judicata* prevented defendant from pleading, relying upon, or showing the existence of the facts which he had alleged in his answer. This condition, therefore, is disclosed by the pleadings: (1) The plaintiff alleges that defendant deprived her of water sufficient to irrigate her crops. (2) The answer denied this allegation, and set forth facts showing that she had ample water. (3) Plaintiff in her reply denied the

existence of these facts, and then (4) alleged that defendant was estopped by his answer in the *Toohey Case*, and by the judgment in that case, from denying that plaintiff had been prevented from using any water.

Thus it appears that plaintiff insists, by her replication, that the defendant is estopped from saying that plaintiff was not deprived of all the waters belonging to the leased land, yet we find in her complaint a direct allegation that she did use a portion thereof, thus by her own complaint contradicting the effect of her plea of estoppel or *res judicata*. This she cannot do. She cannot in her complaint take one position, and, in her replication to defendant's answer, take another one inconsistent with the allegations of her complaint. (Code of Civil Procedure, Sec. 720; Laws of 1899, p. 142; *Hill v. Rich Hill Coal Min. Co.*, 119 Mo. 9, 24 S. W. 223; *Merrill v. Suing*, (Neb.) 92 N. W. 618; *Union Casualty, etc. Co. v. Bragg*, 63 Kan. 291, 65 Pac. 272; *Johnson v. State Bank*, 59 Kan. 250, 52 Pac. 860.)

But, again, the record discloses that plaintiff's own witnesses, when sworn in her case in chief, testified that some of the water was allowed to pass the obstructions complained of at all times, thus contradicting the replication. By defendant's witnesses, when called upon the stand, it was disclosed, without objection, that from seventy to eighty inches of water, to which plaintiff was entitled at all times, passed the obstructions complained of. Plaintiff's attorney sought to avoid the effect of this testimony by a request for the following instruction, which was given by the court: "(8) The court instructs you that if you find from the evidence that the defendant and Joseph Davis filed their answer verified by defendant Campbell in the injunction case of *Toohey v. Campbell and Davis*, in which answer they alleged that they denied the right of Toohey to use said Flannery ditch, or any part thereof, for any purpose, and that from July 7, 1898, till enjoined in said action, they had prevented any water flowing through said Flannery ditch upon the Toohey land, and that they intended to continue so to do, and that, unless re-

strained, they would continue to dam up and stop said ditch so that it could not be used by said Toohey, this defendant cannot be heard to say in this action that he did not do so, but said facts must be taken as true in this action, provided that you further find that the plaintiff was at said time the lessee of said Toohey, and as such in possession of said land, and entitled to the use of said Flannery ditch for irrigation." The court also gave the following instruction, requested by defendant, upon the same proposition: "(1) The court instructs you that if you believe from the evidence that water was allowed to run down said Flannery ditch on the 8th day of July, 1898, and subsequent days between that and the 13th, then it was the duty of the plaintiff to have used said water if she needed the same, and if she failed to do it, and her crops were injured thereby, she cannot be heard to recover such damage as she sustained by reason of failing to use said water between said dates." These instructions are absolutely inconsistent with and contradictory of each other, and we have no doubt but that, under the pleadings and the testimony given in the case, without objection on the part of plaintiff, instruction No. 8 above quoted is erroneous, and that instruction No. 1 is correct.

Counsel for respondents, in their brief, use the following language: "There was no estoppel. The former case of Toohey against Campbell and Davis did not estop any one. *It did determine the truth, though*, and, having been determined in that case, it cannot be again questioned by the parties thereto or their privies." We agree with counsel's statement that no estoppel was involved. The record discloses that upon the trial plaintiff offered in evidence the judgment roll in the *Toohey Case*. This judgment roll is not contained in the record, but the purpose of the suit is recited as having been as follows: "This was an action to determine the right of plaintiff to an interest in a certain water ditch known as the 'Flannery Ditch,' and to establish his right to the use of said ditch, to transmit water to his premises or ranch, and to enjoin the defendants from interfering with the plaintiff's said use of said ditch for said purpose."

After this recital there is quoted, in full, paragraphs 5 and 6 of the complaint, and paragraphs 6 and 7 of the answer, in that suit. Then these additional recitals: "A restraining order was issued in said case, and served on N. S. Campbell on the 15th day of July, 1898, and Joseph Davis on the 16th of said month. One Benjamin Graham intervened in said suit. In the final decree the plaintiff, Toohey, established his right to the use of said ditch. The defendants, Campbell and Davis, had an undisputed right to the use of said ditch, through which to transmit their water which supplied their respective ranches; so, likewise, the intervener, Graham, had the undisputed right to use said ditch, and 142 inches of the waters of the East Galatin river through said ditch. The plaintiff, Toohey, the defendants, Campbell and Davis, and the intervener, Graham, were made by said decree tenants in common in said ditch. The injunction or restraining order was modified on the 23d day of July, 1898, so as to allow only 50 inches of water to flow down to the plaintiff." From this showing in the record we cannot say that the judgment established or found that the defendants in that suit deprived the plaintiff of *all* water. We are bound by the recital in the record as to the purposes for which the suit was brought. Any interference with the rights of the plaintiff claimed and sought to be established and protected would have justified a judgment establishing such rights and protecting them against future interference by the injunction. It is quite apparent from the fact that the record quotes in full certain paragraphs of the complaint and answer, and from the further fact that plaintiff's counsel requested the court to charge the jury as above quoted, that counsel did rely in the court below upon an estoppel arising from defendant's admissions in his answer, and not upon the proposition that the judgment was determinative as to those facts. They, therefore, cannot be heard to change their position in this regard for the first time in this court.

The court erred, as alleged, in the first specification.

2. Failure of Evidence. Inasmuch as the case must be re-

versed and a new trial had, we do not deem it advisable to comment upon this point, or to review the evidence presented in the record.

We therefore advise that the judgment and order overruling defendant's motion for a new trial be reversed, and the case remanded for a new trial.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order are reversed, and the cause is remanded for a new trial.

MR. JUSTICE HOLLOWAY, being disqualified, takes no part in this decision.

FORRESTER & MACGINNISS, PLAINTIFFS; THOMAS R.
HINDS, RESPONDENT, v. BOSTON & MONTANA
CONSOL. COPPER & SILVER MINING
CO. ET AL., APPELLANTS.

(No. 1,697.)

(Submitted October 20, 1903. Decided March 31, 1904.)

Receivers—Expenses—Fees — Excessive Allowances—Determination—Appeals.

1. No motion lies for a new trial of issues involved in the matter of a claim for compensation and expenses of a receivership, and there can be no appeal from an order denying such a motion.
2. An appeal lies from a judgment allowing the compensation and expenses of a receiver.
3. A receiver cannot be allowed fees for counsel to a superintendent in charge of the corporation's property, or for other employes.
4. A defendant in a receivership should not have its property taken to pay expenses of a receiver unjustly and unlawfully kept in office as an officer of the court, where justice requires his discharge.
5. Where a receiver was only in actual possession of the corporation's property for five days, and was free to act as receiver not more than fifteen days altogether, an allowance of \$200, 000 was excessive.
6. Acts of violence exhibited towards a receiver by the agents of the corporation do not justify an excessive allowance of fees to the receiver.

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7. Where a receiver should have been discharged on a certain date, when defendant corporation offered, in writing, to do the very things that plaintiff prayed the court to enforce, he was entitled to a reasonable compensation for services rendered prior to such date, and to be recompensed for proper and reasonable expenses incurred prior thereto, but was entitled to nothing for expenses or services rendered after that date, except, perhaps, a reasonable sum for services of a bookkeeper aiding in rendition of accounts to the court.

MR. JUSTICE HOLLOWAY dissenting.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

ACTION by James Forrester and John MacGinniss against the Boston & Montana Consolidated Copper & Silver Mining Company and others. Thomas R. Hinds was appointed receiver for the property of the defendant corporation. From a judgment fixing the compensation of the said receiver, and from an order denying a motion for a new trial of the issues involved in the claim for such compensation, defendants appeal. Appeal from the order denying a new trial: Dismissed. Appeal from the judgment: Reversed.

Messrs. Forbis & Evans, for Appellant.

Messrs. Pemberton & Maury, Mr. Robert B. Smith, Mr. J. E. Healy, Mr. John J. McHatton, and Mr. George F. Shelton, for Respondent.

MR. JUSTICE MILBURN delivered the opinion of the court.

This is an appeal from an order of the district court (in the form of a judgment) allowing the receiver, Thomas R. Hinds, \$200,000 for compensation for his services, and \$31,116.30 for expenses as such receiver, and from an order denying a motion for a new trial of the issues involved in the matter of the claim for such compensation and expenses.

Two motions to dismiss these appeals have been filed—one by the plaintiffs and one by the respondent, Thomas R. Hinds.

The appeal from the order denying the motion for a new trial is dismissed. There is no such appeal known, and no such motion lies. *State ex rel. Heinze v. District Court*, 28 Mont. 227, 72 Pac. 613.

The motions for dismissal of the appeal from the judgment fixing the compensation and expenses must be, and are, denied. Under the authority of the case just above cited, appeal lies from a judgment fixing the compensation of a receiver. The notice of appeal shows clearly that an appeal was taken from the judgment fixing the compensation, and that an appeal was taken from the order denying the motion for the new trial asked for. There is not anything to show that the bond on appeal was not sufficient and regular in form, and properly filed.

The history of this receivership would fill a volume of considerable size, and we shall not attempt to narrate it here. We merely refer for such history to *Forrester et al. v. Boston & Montana Consol. Copper & Silver Min. Co.* 21 Mont. 544, 55 Pac. 229, 353; *State ex rel. Boston & Montana Consol. Copper & Silver Min. Co. v. Second Judicial Dist. Ct.*, 22 Mont. 220, 56 Pac. 219; *Id.* 22 Mont. 241, 56 Pac. 281; *Id.*, 22 Mont. 376, 56 Pac. 687; *Forrester & MacGinniss v. Boston & Montana Consol. Copper & Silver Min. Co.*, 22 Mont. 430, 56 Pac. 868; *Id.*, 23 Mont. 122, 58 Pac. 40; *Id.*, 24 Mont. 148, 153, 60 Pac. 1088, 61 Pac. 309; and *Id.* 29 Mont. 397, 74 Pac. 1088.

The receiver was appointed December 15, 1898. On account of certain stays ordered by the supreme court in the numerous proceedings he was free to act as such receiver not exceeding fifteen days; that is to say, part of December 15, and part of December 16, 1898, and from the 1st of April to the 13th, inclusive, 1899. He was in actual possession of the property from April 8th to the 13th, inclusive, and no longer. On February 28th of the same year the defendants moved the district court to vacate the order appointing the receiver. As said in the opinion of this court in certain *mandamus* proceedings instituted to force the district court to take up, hear and determine

said motion (22 Mont., at page 443, 56 Pac. 868), the court's treatment of said motion and its delay in hearing and determining the same, were unjustifiable, unfair and oppressive. It is apparent that the court's delay in hearing and determining that motion was at the instance of the plaintiffs. The motion to vacate was taken up on April 1st, and continued from time to time, and never was determined by the district court until it was coerced by this court. The hearing was completed April 6th, and the motion denied April 10th. On April 5th the defendants, by written notice served upon the plaintiffs, offered to do and perform everything that the plaintiffs endeavored to procure to be done, and to allow judgment to be entered against themselves in favor of the plaintiffs for all costs. Defendants promptly appealed from the order of April 10th overruling their motion to vacate the appointment of the receiver, and on the 13th day of the same month this court, pending the appeal, ordered that all the property then in possession of the receiver be turned back to the defendants upon their executing a satisfactory bond. (22 Mont. 430, 56 Pac. 868.) This was done. On June 8, 1900, the order of the district court denying the motion to vacate the order appointing the receiver was reversed (24 Mont. 153, 61 Pac. 309), for the reason that the defendants had remedied the evils complained of in the plaintiffs' complaint, and there was no longer any just reason why a receiver should be had. Therefore, in one of the appeals, the appointment of the receiver in the first instance was held valid.

There were not any services rendered by anybody whomsoever in the matter of the receivership after April 13th; still the receiver claims compensation for a period of time extending from December 15, 1898, until the 18th day of July, 1900. He was in possession of the property not exceeding six days—from April 8th to 13th, inclusive. There is not in the record sufficient information in reference to his personal expenses to enable this court to determine either as to their necessity, or whether the items of expense were incurred before or after the

time he properly should have been discharged on the motion of February 28th. Therefore it appears to us that the district court erred in allowing said expense account on the evidence adduced; and the other expenses, to-wit, \$14,000 for "assistant receiver" (that is, superintendent, James T. Stanford, in charge of the defendants' property at Great Falls); \$1,000 for Austin Brown, metallurgist; \$10,000 for W. Y. Pemberton, as counsel; \$5,000 for J. B. McClernan, as assistant counsel; \$500 for services of M. M. Leiter, as counsel to Supt. Stanford; and \$500 for J. J. Harrington, as bookkeeper (excepting, perhaps, part of the expense incurred for bookkeeper) all appear to have been incurred after the 5th day of April, 1900, excepting, perhaps, the items as to W. Y. Pemberton and J. B. McClernan, there being nothing definite in the record to show when they were employed or what services they rendered, and are not expenses which on any just principles should be paid from the property of the defendants. In no event can fees be allowed for counsel to the superintendent or other employes of a receiver.

It is not necessary to waste time or space in citing authorities to support the proposition that a defendant in a receivership proceeding should not have its property taken to pay the expenses of a receiver unlawfully and unjustly kept in office as an officer of the court, when justice requires his discharge. We merely refer to *McAnrow v. Martin*, 183 Ill. 467, 56 N. E. 168; *Ogden City v. Bear Lake & R. W. & I. Co.*, 18 Utah, 279, 55 Pac. 385; *Willis v. Sharp*, 58 Hun. 608, 12 N. Y. Supp. at page 120; *High on Receivers* (2d Ed.), 796, and cases cited. We add that the evidence shows that until the "fore part" of April 1899, the receiver availed himself of the advice and counsel of the attorneys of the plaintiffs in the receivership proceedings.

Even if the court had been right in refusing to discharge the receiver, and he had been justly in the possession of the said property, the allowance of a fee of \$200,000 would have been excessive, and abuse of discretion on the part of the court. The

allowance of such a fee under the circumstances, and in the light of the history of this case as narrated and referred to above, was gross abuse of discretion. Confiscation of the property of the defendant should not follow the appointment of a receiver. For remarks and facts which are very pertinent, we refer to the opinion of Judge Brewer in *Central Trust Co. v. Wabash, St. Louis & P. Ry. Co.*, (C. C.) 32 Fed. 187.

The receiver seems to rely somewhat upon certain acts of violence exhibited toward him by the defendants and their agents as important reasons why he should receive extraordinary compensation. He testified that the defendants resisted him, threatening him with injury, and offered to assault him, in order to prevent his taking possession of the property. When this violence was exhibited is not clear, but it seems to be charged as happening after April 1, 1898. It may be that the defendants were in contempt of court in resisting the receiver, and it may be that the state of Montana should prosecute the agents of defendants for violation of the law against crime; but we do not understand that the property of the defendants should be taken to pay the receiver what the state might recover as a fine, or that Thomas R. Hinds, as a private citizen, might recover as damages in the proper suit.

Inasmuch as the receiver should have been, in justice, discharged certainly as early as April 5, 1898, when the defendant offered, in writing, to do the very things that the plaintiffs prayed to have done by decree of court, we hold that he may be compensated in a reasonable sum for services rendered by him prior to said last-mentioned date, and be reimbursed for all proper and reasonable expenses incurred prior thereto, and that he receive nothing and be allowed nothing for any services or expenses alleged to have been rendered or incurred after that date out of the property of the defendants, excepting, possibly, a reasonable sum for services of a bookkeeper aiding in rendition of accounts to the court.

If it be conceded that, under the present statute (Laws Second Extraordinary Sess. 1903, Chapter 1), we have authority

to review and determine this case *de novo*, we have to say that, owing to the meager evidence appearing in the record, it would be impossible for us to arrive at a just and satisfactory conclusion as to how much should be allowed the receiver for his expenses and compensation.

The judgment of the district court appealed from is reversed.

Reversed.

MR. JUSTICE HOLLOWAY: I dissent. I do not agree with the majority of the court in the disposition that is made of this case. The Second extraordinary session of the Eighth legislative assembly passed an Act amending Section 21 of the Code of Civil Procedure. Among other things, that section, as now amended, provides: "In equity cases, and in matters and proceedings of an equitable nature, the supreme court shall review all questions of fact arising upon the evidence presented in the record, * * * and determine the same, as well as questions of law, unless, for good cause, a new trial or the taking of further evidence in the court below be ordered." The manifest purpose of the legislature in passing this Act was to enable this court, upon appeals in equity cases, and in proceedings of an equitable character, to finally dispose of the cause, either by making the proper order itself, or by directing specifically what disposition should be made of the cause in the court below. This legislation is binding upon this court, and, in my opinion, should be followed in every instance where the record presents sufficient evidence to enable us to finally dispose of the litigation, thereby obviating new trials and subsequent appeals. I am of the opinion that the evidence in this record is sufficient to enable this court to determine which items of compensation should be allowed, which should be disallowed, and the amount that should be allowed in those instances where the compensation fixed by the lower court is deemed excessive. .

STATE EX REL. GNOSE, RELATOR, v. DISTRICT COURT
OF DEER LODGE COUNTY, RESPONDENT.

(No. 2,044.)

(Submitted February 28, 1904. Decided March 31, 1904.)

Judges—Disqualification—Change of Venue—Motion.

Code of Civil Procedure, Section 615, as amended by the second extraordinary session of the Eighth legislative assembly, is mandatory, and the district court must change the venue in the cases prescribed, but only after a motion has been filed, and a showing made as required by the clause of the section invoked. The court cannot act of its own motion.

ON WRIT of review by the state on the relation of J. B. Gnose, against the district court of Deer Lodge county, to review an order of said court changing the venue in an action wherein J. B. Gnose was plaintiff and Daniel James was defendant. Order annulled.

Mr. W. H. Trippet, and Mr. Geo. B. Winston, for Relator.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

An action was commenced in the district court of Deer Lodge county by J. B. Gnose, plaintiff, against Daniel James, defendant. After issue was joined, the cause was set for trial. Thereafter, on the 28th day of January, 1904, the defendant in the action filed an affidavit under the provisions of Subdivision 4 of Section 180 of the Code of Civil Procedure, as amended by the Second extraordinary session of the Eighth legislative assembly, stating that he had reason to believe and did believe that he could not have a fair and impartial trial before the Honorable Welling Napton, district judge of the Fourth judicial district, then presiding, by reason of the bias and prejudice of such judge. A motion for a change of venue was not

made by either party, but the court, on its own motion, and over the objection of plaintiff, made an order changing the place of trial from the district court of Deer Lodge county to the district court of Lewis and Clarke county. Upon application, a writ of review was issued from this court to review the order.

The provisions for a change of venue in civil actions are found in Section 615 of the Code of Civil Procedure, as amended by the Second extraordinary session of the Eighth legislative assembly: "Sec. 615. The court or judge must on motion change the place of trial in the following cases." The four subdivisions of the section then specify the particular circumstances under which a party may be entitled to a change of venue. The provisions of that section are mandatory, and require the district court to change the venue, but only after a motion has been filed and a showing made as required by the particular subdivision of the section under which the change of venue is sought. The court cannot act of its own motion, for, while a party may have an absolute right to a change of venue, it is a right that he may waive, and the court is without authority to invoke the statute in his behalf. (*Miller v. Claflin*, 12 Colo. App. 192, 55 Pac. 201.) In attempting to change the venue in this instance, the district court exceeded its jurisdiction.

The order is annulled.

Order annulled.

WOODY, APPELLANT, v. HINDS ET AL., RESPONDENTS.

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(No. 1,840.)

(Submitted March 26, 1904. Decided April 4, 1904.)

Mining Claims—Action to Determine Adverse Claim—Pleadings—Sufficiency—Amendment.

1. A complaint under Rev. St. U. S. Sec. 2326, showing possession under claim of title in plaintiff, an application for a patent by defendant, the filing and allowance of an adverse claim in the land office, and that the action was commenced within thirty days after the allowance, is sufficient, whether the action be treated as one under Code of Civil Procedure, Section 1310 or Section 1322. It is not necessary in either case that plaintiff particularly set forth the nature of defendant's claim, but that duty devolves on defendant.
2. Under Rev. St. U. S. Sec. 2326, providing that adverse claimants of mineral land shall, within thirty days after filing their claim, commence proceedings in a competent court to determine the right of possession, an action commenced within the thirty days proceeds to judgment as other actions, and the court, as in other actions, may permit amendments to the complaint so as to make it state a cause of action, even after the thirty days have expired.
3. An allegation in a complaint under Rev. St. U. S. Sec. 2326, providing that adverse claimants of mineral land shall, within thirty days after filing "a claim," sue to determine the right of possession, is not bad for uncertainty or ambiguity, when it states that a "protest" was also filed.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

ACTION by George H. Woody against Thomas R. Hinds and others. From a judgment for defendants, plaintiff appeals. Reversed.

Mr. M. J. Cavanaugh, and Messrs. Forbis & Mattison, for Appellant.

Mr. J. E. Healy, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought in pursuance of Section 2326 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1430], to determine an adverse claim to the Jennie M. quartz lode, situate in Silver Bow county. The adverse claim is asserted by defendants under a location covering the same ground and called the "Rival lode." The original complaint was held insufficient on general demurrer, but leave was granted to file an amended complaint. It is therein alleged that the plaintiff is the owner, in possession and entitled to the possession, of the Jennie M. lode, describing it; that defendants claim an estate

therein, adverse to the plaintiff, by reason of the pretended ownership of the so-called "Rival lode claim," but that the defendants have no right, title or interest therein. It is then further alleged that on October 2, 1901, the defendants filed, in the United States land office at Helena, their application for a patent to the Rival claim, and caused notice of their application to be published; that within sixty days thereafter the plaintiff filed a "protest and adverse claim" against the said application; that the protest and adverse claim was allowed; and that thereafter, and within thirty days, this action was brought to have said adverse claim determined. To this amended complaint a demurrer was interposed, alleging (1) that it does not state facts sufficient to constitute a cause of action; (2) that the facts stated do not confer jurisdiction to determine any adverse claim of the plaintiff; and (3) that the pleading is uncertain, ambiguous and unintelligible. The demurrer was sustained. Thereupon, the plaintiff having declined to plead further, judgment was entered for defendants. Plaintiff has appealed.

It is impossible to understand upon what theory the district court held this pleading insufficient. It appears therefrom that the plaintiff is in possession under claim of title, that the defendants had applied for a patent under the Rival location, that an adverse claim had been filed in the land office and allowed, and that the action was commenced within thirty days after such allowance. This is sufficient to sustain the action. (*Mattingly v. Lewisohn*, 8 Mont. 259, 19 Pac. 310; *McKay v. McDougal*, 19 Mont. 488, 48 Pac. 988; *Murray v. Polglase*, 23 Mont. 401, 59 Pac. 439; *Hopkins v. Butte Copper Co.*, 29 Mont. 395, 74 Pac. 1081.) This is true, whether the action be regarded as one to quiet title under Section 1310 of the Code of Civil Procedure—which in fact it is—or a special statutory proceeding under Section 1322. It was suggested in *Mares v. Dillon*, 30 Mont. 117, 75 Pac. 963, that the latter section possibly contemplates a special form of action for these cases; whether it does or not need not now be considered, for the reason that, if it does, the pleading is sufficient, because it contains

more than would in that case be required. Upon either theory the plaintiff is not required to set forth with particularity the nature of defendants' claim. This duty devolves upon defendants under Section 1310, as is clearly implied by Section 1311. In an ordinary action under the former, if the defendant does not appear, or if he enters a disclaimer, he is not even adjudged to pay costs. If the action is brought, in pursuance of the statute of the United States, to determine who is entitled to the patent, the requirements of Section 1322 apply. In that case, if the defendant does not appear, he must nevertheless be adjudged to pay costs, unless he file a relinquishment in the land office, or disclaim an interest, in writing, within twenty days after the adverse claim has been filed. In any event, the purpose of the proceeding is to have defendant's adverse claim determined, and the duty is cast upon him to make discovery of his claim, in order that the court may properly determine it. (*Castro v. Barry*, 79 Cal. 443, 21 Pac. 946; *People v. Center*, 66 Cal. 557, 5 Pac. 263, 6 Pac. 481; *Heeser v. Miller*, 77 Cal. 192, 19 Pac. 375; *Rough v. Simmons*, 65 Cal. 227, 3 Pac. 804; *Scorpion Silver Mining Co. v. Marsano*, 10 Nev. 380; *Jeffersonville, etc. R. R. Co. v. Oyler*, 60 Ind. 392; *Mont. Ore Pur. Co. v. Boston & Mont. C. C. & S. M. Co.*, 27 Mont. 288, 70 Pac. 1114.)

It is said that the court had no jurisdiction of the action because it is apparent that the amended complaint was filed long after the expiration of the thirty days from and after the suspension of the proceedings in the land office; in other words, the court cannot proceed to judgment in such cases unless a complaint stating a cause of action has been filed within thirty days after the filing of the adverse claim. This contention cannot be sustained. If the action is brought in time, it proceeds to effective judgment as other actions, and the court has the same power to allow amendments to pleadings as in other cases.

The complaint is not open to the objection stated in the last ground of demurrer. It is entirely clear from the pleading what the purpose of the action is, though it is alleged that a

“protest” was filed, with the statement of adverse claim, in the land office. Whether or not this was done is immaterial, and does not affect the cause of action stated.

The judgment is reversed, and the cause is remanded for further proceedings.

Reversed and remanded.

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STATE EX REL. BOSTON & MONTANA CONSOLIDATED	
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(No. 2,049.)	

(Submitted February 28, 1904. Decided April 4, 1904.)

*Contempt—Nature of Proceedings—Disqualification of Judge
—Change of Venue—Statutes—Constitutional Law.*

1. *Obiter:* A proceeding in contempt to punish for the violation of an injunction, is distinct from the action wherein the injunction violated was issued.
2. *Obiter:* The court will not decide the question of the constitutionality of a statute, unless the decision of such question is necessary.
3. Code of Civil Procedure, Sections 180 and 615, as amended by Acts of the Second extraordinary session of the Eighth legislative assembly (1903), relating to disqualification of judges and change of venue, have no application to contempt proceedings.
4. Contempt proceedings are of a criminal nature.
5. *Obiter:* In contempt proceedings the evidence must show that the accused party is guilty beyond a reasonable doubt.
6. Under Constitution, Art. VIII, Secs. 1, 11, which, as shown by the original draft of the Constitution finally adopted, read, “The judicial power of the state shall be vested * * * district courts,” etc., and that “the district

courts shall have original jurisdiction," etc., the district courts are distinct entities, and a transfer of a cause from one district to another amounts to a change of venue.

7. The power to punish for contempt is inherent in the district courts, and exists independently of statutes, and cannot be taken away or so far abridged by the legislature as to leave such courts without proper and vigorous means of protecting themselves from insult or of actually enforcing their lawful orders.
8. Legislation passed at an extraordinary session of the legislature must be interpreted in the light of the proclamation of the governor convening such session.

WRITS of prohibition by the state, on the relation of the Boston & Montana Consolidated Copper & Silver Mining Company and another, against William Clancy, judge of the district court of the Second judicial district, and the district court of the said district of Silver Bow county, and by the state on the relation of the same company, against E. W. Harney, judge, and another. Alternative writ quashed, and proceedings dismissed.

Messrs. Forbis & Evans, Mr. A. J. Shores, and Mr. C. F. Kelley, for Relator.

Mr. John J. McHatton, Mr. J. M. Denny, Mr. T. J. Walsh, Messrs. Toole & Bach, and Mr. Jesse B. Roote, for Respondents.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

These causes were heard at the same time, and submitted on the same briefs. As the facts are practically the same a statement of one cause will suffice for both.

A petition filed herein alleges that in a certain action pending in the district court of Silver Bow county an injunction was issued and served on these relators, enjoining them from going upon certain designated ground. Thereafter an answer was filed charging the relators with violating such injunction. An order to show cause why they should not be punished for contempt was issued and served, but before the time

for the hearing, the relators filed an affidavit alleging that they had reason to believe, and did believe, that they could not have a fair and impartial hearing of such contempt proceeding before the judge presiding, on account of the bias and prejudice of such judge, and a like affidavit was also filed in the action out of which the contempt proceeding grew, but notwithstanding the filing of such affidavits the judge proceeded to hear the matters. Thereupon an alternative writ of prohibition was sued out of this court. The return raises no question of fact, but there is submitted for consideration the construction of Sections 180 and 615 of the Code of Civil Procedure, as amended by the Second extraordinary session of the Eighth legislative assembly.

It may be observed, in passing, that "the proceeding in contempt is distinct from the action wherein the injunction violated was issued." (*State ex rel. Flynn v. Dist. Court*, 24 Mont. 33, 60 Pac. 493; *Ex parte Gould*, 99 Cal. 360, 33 Pac. 1112, 21 L. R. A. 751, 37 Am. St. Rep. 57); and while the alternative writ of prohibition restrains the court from proceeding in the main action out of which the contempt proceeding grew, as well as in the contempt proceeding itself, it is to that extent unwarranted by the facts, as the petition does not charge any attempt on the part of the court to do more than proceed in the contempt matter, so that this prohibition proceeding will be treated as if directed against the attempt to hear the contempt matter only.

The question of the constitutionality of Sections 180 and 615 as amended, above, is only indirectly involved; and, as this court will not decide such a question unless necessary, consideration of that matter will be deferred until a decision is reached in another cause submitted at the same time as these, and in which that question is directly involved, and a solution of it necessary to a determination of the cause.

If the Acts are unconstitutional, the court properly disregarded them for that reason. If they are valid, but have no

application to contempt proceedings, they could be properly disregarded for that reason. .

Section 180 of the Code of Civil Procedure, as originally enacted, among other things, provides the circumstances under which a district judge is disqualified to hear or determine any action or proceeding before him: (1) When he is a party or when he is interested; (2) when he is related to either party within certain degrees; and (3) when he has been attorney for either party, or made or rendered the judgment, order or decision appealed from.

The amendment made by the Second extraordinary session of the Eighth legislative assembly added a fourth ground of disqualification, as follows: "(4) When either party makes and files an affidavit as hereinafter provided, that he has reason to believe, and does believe, he cannot have a fair and impartial hearing or trial before a district judge by reason of the bias or prejudice of such judge."

Section 615 of the same Code provides for a change of venue in civil actions as follows: "(1) When the county designated in the complaint is not the proper county. (2) When there is reason to believe that an impartial trial cannot be had therein. (3) When the convenience of witnesses and the ends of justice would be promoted by the change. (4) When, from any cause, the judge is disqualified from acting."

The amendment made to this section merely adds to Subdivision 4, above, a provision that in case the parties shall agree upon another district judge or upon a member of the bar as judge *pro tempore*, or if any qualified district judge shall be called in, and shall, within thirty days after the motion for change of venue is made, appear and assume jurisdiction of the cause, no change of venue shall be granted.

The only inquiry with which we are now concerned is, do these legislative enactments apply to contempt proceedings, assuming that they are valid and in force?

There is nothing in the amendments which changes the character of the original statutes, and it is clear that, if they did not

apply to contempt proceedings before the amendments were made, they do not now. They do not do so in terms. Rapalje on Contempts, Section 110, says: "It may safely be laid down as a general rule that statutory provisions relative to change of venue have no application to proceedings to punish contempts, unless such proceedings are expressly included, *eo nomine*, in the written law." Whether or not we might be led to accept this author's view of the law, from such surrounding circumstances as may tend to indicate the legislative intention we reach the conclusion that these Acts do not apply to contempt proceedings.

Section 180 is comprised in Part I, Title II, of the Code of Civil Procedure; and that title has to do with judicial officers, as such, and not with courts or court proceedings. It assumes to prescribe the qualifications and disqualifications of such officers; designates the acts which they may perform at chambers, and the incidental powers and duties of such officers. The amendment only seeks to add an additional disqualification.

Section 615 is included in Part II, Title IV, of the same Code; and this title has to do with the place of trial of *civil actions*, including the provisions for change of venue. In determining the applicability of this section to the question before us, it is therefore only necessary for us to consider whether contempt proceedings fall within the meaning of the term "civil actions."

Blackstone treats of contempts under the head of crimes and misdemeanors (4 Bl. Com. 1), punishable as an offense against public justice (*Id.* c. 10) and also by summary proceedings (*Id.* c. 20).

In *New Orleans v. Steamship Co.*, 20 Wall. 387, 22 L. Ed. 354, the Supreme Court of the United States said: "Contempt of court is a specific criminal offense. The imposition of the fine was a judgment in a criminal case."

In *In re Buckley*, 69 Cal. 1, 10 Pac. 69, in speaking of a constructive contempt, the Supreme Court of California said: "It should be remembered that the proceeding here taken is criminal or *quasi* criminal." In *Ex parte Gould*, *supra*, the

same court said: "Although the alleged misconduct of defendants occurred in the progress of a civil action, the proceeding to punish them for such misconduct is no part of the process in the civil action, but is in the nature of a criminal prosecution."

In *State ex rel. Flynn v. District Court*, 24 Mont. 33, 60 Pac. 493, this court said: "When prosecuted under the Code of Civil Procedure, a contempt of court is not to be regarded as a criminal offense, to be prosecuted only by complaint, information or indictment, as laid down by Section 8 of Article III of the state Constitution, but, rather, as a special proceeding of a criminal character—in that sense, it is a public offense." (*Phillips v. Welch*, 11 Nev. 187; *Baltimore & O. R. R. Co. v. Wheeling*, 13 Grat. 57.)

So highly penal in character are these proceedings considered, that the evidence must show that the accused party is guilty beyond a reasonable doubt. (*State ex rel. Boston & Montana C. C. & S. Mining Co. v. District Court*, 30 Mont. 96, 75 Pac. 956; *Potter v. Low*, 16 How. Prac. 549; *State v. Davis*, 50 W. Va. 100, 40 S. E. 331; *Accumulator Co. v. Con. Elec. Storage Co.*, (C. C.) 53 Fed. 793; *United States v. Jose*, (C. C.) 63 Fed. 951.) And a mere preponderance of the evidence is not sufficient. (*In re Buckley*, above.)

Furthermore, the same acts which may be punished in the summary proceeding are characterized by the lawmaking power as criminal, and the additional remedy by an ordinary criminal action is provided for in Penal Code, Section 293. Contempt proceedings are *sui generis*; and, from a consideration of the foregoing authorities, and an examination of the practice provided for in the Code of Civil Procedure (Sections 2170-2183) for summary punishment of contempts, it is apparent that these contempt proceedings have most, if not all, of the characteristics of a criminal case, and few, if any, of a civil action.

A change of venue in criminal cases is provided for in Penal Code (Sections 1970-1981), and the legislation under consideration has nothing to do with that Code. As Section 615 has to

do with change of place of trial in civil actions, and as a contempt proceeding is not such an action, we hold that, in amending that section, contempt proceedings were not in contemplation of the legislature.

While respectable authority may be found in support of the contention that it is beyond the legislative power to provide for a change of venue or change of judge in contempt proceedings, it is not now necessary to consider that matter. It is sufficient for this inquiry to say that the legislature did not do so in this instance.

The relators suggest that in fact no attempt is made to change the venue by this section, as those terms are generally understood; that our district courts are in reality only the several departments of one court—and in support of that contention quote the opening sentence of Section 11, Article VIII, of the Constitution: "The district court shall have original jurisdiction in all cases at law and in equity," etc. However, an examination of the original draft of the Constitution as finally adopted, now on file in the office of the secretary of state, discloses that there is a misprint in the printed copies in general use. The opening sentence reads, "The district courts shall have original jurisdiction," etc. Section 1 of Article VIII reads: "The judicial power of the state shall be vested in the senate sitting as a court of impeachment, in a supreme court, district courts, justices of the peace, and such other inferior courts as the legislative assembly may establish in any incorporated city or town." It is therefore clear that the district courts of this state are distinct entities, and that the transfer of a cause from one district to another would amount to change of venue, within any proper meaning which might be ascribed to those terms.

Neither do we think that such proceedings were in contemplation of the legislature in amending Section 180, above. It is conceded by counsel for relators that neither of these sections has any application to contempts committed in the immediate presence of the court, and that this is so is apparent from the

practice indicated, which could not possibly be made applicable in such instances. But it is contended that this Act does apply to what are designated as constructive contempts, such as were under consideration by each of the departments of the district court, to prevent the further proceedings in which was the object to be sought in each of these applications to this court.

The power to punish for contempt is inherent in the district courts of this state, and is necessary to the existence of the courts and the orderly conduct of the business before them. (*Territory v. Murray*, 7 Mont. 251, 15 Pac. 145.) That power exists independently of statute, and any legislation upon the subject touching the power itself must be regarded as merely declaratory of the common law, or, if in contravention of the common law, would doubtless be held inoperative. We may assume, without deciding, that the legislature may prescribe reasonable rules for the practice in such cases, and may provide a reasonable limit to the punishment to be inflicted; but that it may, directly or indirectly, deprive a court of the power to enforce its decrees, or obedience to its lawful mandates, cannot be conceded. (*In re Pierce*, 44 Wis. 411.) Neither will any legislation be effective which so far abridges, impairs or cripples the power as to leave the courts without ample, vigorous means of protecting themselves from insult, or of effectually enforcing their lawful orders. As this power is inherent in the district courts, it is merely truismatic to say that a power which the legislature does not give, it cannot take away. (*Hale v. State*, 55 Ohio St. 210, 45 N. E. 199, 36 L. R. A. 254, 60 Am. St. Rep. 691; *Holman v. State*, 105 Ind. 513, 5 N. E. 556.)

But it is contended that the only effect of Section 180, as amended, is to deprive a particular judge of the power to preside at such hearing, and does not in any other manner interfere with the lower court itself. But it is difficult to conceive of a court without a presiding judge, and if, upon the filing of an affidavit such as is contemplated by Section 180 as amended, the presiding judge becomes, *ipso facto*, disqualified to hear the matter further, any other investigation into the alleged con-

tempt must be made to depend upon the bare possibility that another judge may be procured to hear it. Contempt proceedings are summary, and, in contemplation of law, will be heard and disposed of without any unnecessary delay. If Section 180, as amended, be valid and applicable to contempt proceedings, then a party charged may disqualify successively five judges who might be secured to hear the matter, and, in the absence of some more effective means than any now known of compelling outside judges to undertake such hearings, it is no stretch of the imagination to foresee an absolute inability in the courts to enforce their mandates or respect for their authority. And a court without power to enforce its lawful orders would merit the contempt of every one.

We are of the opinion that this section cannot be made applicable to contempt proceedings without materially interfering with the inherent power of these courts, and, in the absence of any express legislative declaration on the subject, we prefer to believe that the legislature did not intend to invade unnecessarily the province of a co-ordinate branch of the state government, and therefore did not have contempt proceedings in contemplation in passing this Act.

The Acts amending Sections 615 and 180, above, are companion measures. They were both enacted at an extraordinary session of the legislature, and were intended to be correlative measures, operating to accomplish the same end, or, more strictly speaking, the Act to amend Section 615 was intended to supplement the Act amending Section 180. This conclusion is reached by a consideration of the proclamation of the governor convening the legislature in extraordinary session. The dual purpose sought to be accomplished, as expressed in that proclamation, so far as the inquiry before us is concerned, was, first, general legislation whereby bias and prejudice of district judges shall constitute a disqualification of such judges; and, second, legislation making suitable provision for the trial of *such case or cases in such event*. Section 11, Article VII, of the Constitution, provides that, when the legislature is called

in extra session, "It shall have no power to legislate on any subjects other than those specified in the proclamation, or which may be recommended by the governor." In this instance no recommendations were made by the governor differing in any degree from the matters embraced in the proclamation above, so far as the question before us is concerned; and, as the two measures now under consideration were the only ones enacted which have any reference whatever to either of the subjects enumerated above, it is quite apparent that the amendment to Section 180 is the legislation which was intended to meet the first condition, and the amendment to Section 615 is the legislation which was intended to meet the second. The amendment to Section 615, then, was intended to make suitable provision for the trial of all civil cases wherein the presiding judge may be disqualified pursuant to the provisions of Section 180 as amended. The scope of the amendment to Section 615 is as broad as that to Section 180; in other words, each comprehends the same class of cases—nothing more, nothing less. If the amendment to Section 615 has no application to contempt proceedings, as we have already seen, it follows, as a matter of course, that the amendment to Section 180 has none. However comprehensive the terms employed in this amendment are, they must be read in the light of the proclamation of the governor, and considered with the amendment to Section 615 and the two Acts construed together. When this is done, we are forced to the conclusion that contempt proceedings were not in the legislative contemplation in passing either of them.

The alternative writ heretofore issued in each of these proceedings is quashed, and the proceedings are dismissed.

Dismissed.

STATE EX REL. DONOVAN, ATTORNEY GENERAL, RELATOR,
v. BARRET, STATE TREASURER, RESPONDENT.

(No. 2,048.)

(Submitted March 7, 1904. Decided April 6, 1904.)

*State Officers — Salaries — Appropriations by Legislature—
Mandamus—State Board of Examiners—Powers.*

1. *Mandamus* is a discretionary writ and will be allowed only in furtherance of justice upon a proper case presented.
2. The writ of mandate will not be allowed to compel the state treasurer to pay a warrant issued by the state auditor, when the money particularly appropriated by the legislature for such purpose has been exhausted.
3. The state board of examiners cannot increase an appropriation made by the legislature for a specific purpose, by adding thereto moneys which the legislature appropriated for entirely different purposes.

ORIGINAL application for *mandamus* by the state, on the relation of James Donovan, Attorney General, against A. H. Barret, State Treasurer. Alternative writ quashed and the proceeding dismissed.

Mr. James Donovan, Attorney General, in pro. per.

Mr. E. C. Day, for Respondent.

MR. JUSTICE MILBURN delivered the opinion of the court.

The relator prays in this proceeding for a writ of mandate ordering the state treasurer to pay a certain warrant issued by the state auditor to one James B. Toughill for services performed in the office of the attorney general as stenographer between the first day of January and the first day of February, 1904, or, if the said warrant may not be paid for want of funds, to register the same according to law. An alternative writ was issued and answer made.

At the Eighth session of the legislative assembly there was appropriated for the purpose of paying the salary of steno-

grapher for the attorney general for the fiscal year ending November 30, 1903, the sum of \$600, and a like sum for the same purpose for the fiscal year ending November 30, 1904. The state auditor, acting by and under the advice of the attorney general, who is the relator herein, issued warrants to pay the stenographer in the office of the attorney general during the fiscal year 1903 at the rate of \$100 per month, excepting the months of December, 1902, and January, 1903, during which months \$50 per month only was paid, all of this money being paid to Toughill, excepting \$50 for the month of December, 1902, of said fiscal year. Acting upon the same advice, warrants were drawn by the auditor in payment for such services for the month of December and for the month of January of the fiscal year 1904 at the rate of \$100 per month. The total amounts of said warrants as drawn thus appears for the two fiscal years to be \$1,300, whereas \$1,200 only was appropriated.

It appears from the record and the evidence in this matter that \$500 appropriated by the legislature for entirely different purposes, to-wit: \$450 on account of salary of the second assistant attorney general and \$50 unexpended balance of moneys appropriated for office expenses of the attorney general, was by the board of examiners on January 30, 1904, attempted to be transferred to the fund for the payment of the stenographer in the office of the attorney general, whereas the legislature had appropriated only \$600 for each of the fiscal years 1903 and 1904 for the payment of services of the stenographer. It was thus attempted to obtain and provide a sum of \$1,700 therefor. The contention of the relator is that there is \$500 still remaining in the hands of the treasurer of said appropriation of \$600 per annum for the two fiscal years, his contention being that of the \$1,300 for which warrants have already been drawn, part thereof, to-wit, \$500, came from funds thus attempted to be taken from entirely different funds. The contention of the treasurer is that the appropriation for the services of the stenographer has been exhausted under warrants drawn by the auditor for \$100 per month, who acted under the advice of the attorney general who, as above stated, is the relator herein.

Without discussing the point that the attorney general is not a proper party to institute these proceedings, it is sufficient to say that he cannot occupy a stronger position than the stenographer himself could in the matter. The latter is, and always has been, supposed to know the statute which was passed making said appropriation for the services which he rendered. He knew, as did the attorney general know, that the appropriation was \$600 for each of the fiscal years named; he knows that in the payment of his services the full amount of the appropriations for both fiscal years has been exhausted. He certainly could not be heard in a proceeding instituted by him for a mandate to compel the treasurer to pay him more than the appropriation; and as certainly the attorney general may not be so heard, if it may be conceded that he may be heard at all. As very properly said in *Hale v. Risley*, 69 Mich. 596, 37 N. W. 570, *mandamus* is a discretionary writ and will be allowed only in furtherance of justice upon a proper case presented. It will not be allowed where the relator has instigated, authorized, approved of or brought about the very state of things which prevents any further payment to the stenographer, and it would not be justice to the state or to the treasurer to permit more money to be drawn from the treasury than was appropriated by the legislature for the purpose intended. (Merrill on *Mandamus*, Sec. 68; *People ex rel. Wood v. Board of Assessors*, 137 N. Y. 201, 33 N. E. 145.) The relator's case is not aided or strengthened by the fact that he, acting with the other members of the state board of examiners, undertook to add to the appropriation made by the legislature for said services, the sums of \$450 and \$50 as above stated. Having erroneously advised the overdraft for the fiscal year 1903, this error cannot be corrected by pleading the further error of having attempted to use funds, to-wit, \$450 and \$50 which the legislature appropriated for entirely different purposes. Money can be paid out of the treasury only upon appropriations made by law (Article V, Section 34, Constitution).

The alternative writ is quashed and the proceeding dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY: I concur in the result. I do not think that the attorney general is the party beneficially interested in the sense that the writ may issue at his instance. Touching Toughill's relation to the disposition of the appropriation for 1904, were he the relator, I express no opinion.

STATE EX REL. BOSTON & MONTANA CONSOLIDATED
COPPER & SILVER MINING COMPANY, RELA-
TOR, v. DISTRICT COURT OF THE SECOND
JUDICIAL DISTRICT ET AL.,
RESPONDENTS.

(No. 2,042.)

(Submitted February 26, 1904. Decided April 12, 1904.)

*Mines—Action Pending—Inspection and Survey—Expense—
Payment — Constitution—Taking Property Without Com-
pensation—Inspection of Books and Papers—Order—Modi-
fication.*

1. Where an action was brought to have defendant declared a trustee for the benefit of plaintiff of an interest in mining property, and, after an application for inspection had been filed, plaintiff amended his complaint, without changing the theory of the cause of action or the issues, except that the particulars of the negotiations and the resulting agreements by which plaintiff acquired rights in the property were in some respects different from those stated in the original complaint, the amendment did not necessitate that the proceeding for inspection should be begun *de novo*.
2. Where defendant appeared and resisted a motion for an inspection on its merits, without objecting that the required formalities of demand and notice had not been fully complied with, and it appeared that the action in which the evidence sought was to be used was then pending, and that such evidence was not in plaintiff's possession, but was under defendant's control, and related to the merits of the action, defendant could not object that the order for such inspection was prematurely made.
3. Where, in an action to have defendant declared a constructive trustee of an interest in mining property, plaintiff applied for an inspection of certain books and papers, together with defendant's workings of the mine, and defendant appeared at the hearing and filed a counter affidavit which controverted none of the statements contained in plaintiff's affidavit as to the existence of the letters and other documents, defendant's possession thereof,

or that they related to the merits of the action, but only denied that defendant was in possession of such records, etc., "within the state of Montana," it was no objection that the affidavits on which plaintiff's application was based were on information and belief.

4. Where, on an application for inspection of books and papers, it appeared that the evidence sought was desired for use in a pending action, and that it was in defendant's possession, and related to the merits of the action stated by plaintiff, it was not a prerequisite to the granting of such application that plaintiff should also show that the evidence could not be obtained from other sources.
5. Under Code of Civil Procedure, Section 1810, declaring that an inspection of evidence shall be had within a specified time, an order granting an inspection is defective, where it fails to fix the time at which the inspection shall begin and when it shall be completed.
6. Where an order directed defendant to permit plaintiff to inspect original letters in defendant's possession, a further provision that plaintiff should also be entitled to examine "letterpress copies of such letters" was erroneous.
7. Where, in an action to have defendant declared a constructive trustee of a certain interest in mining property, plaintiff claimed that he had been deprived of the same by reason of a fraudulent conspiracy by defendant and certain others, by means of which defendant acquired title to the property, an order for inspection of defendant's books and papers with reference to such property should have been limited to such of the correspondence between defendant's executive officers and its agents through whom the purchase of the property was made as related to the acquisition of the title to such property.
8. An order granting inspection of the underground workings of a mining claim should determine and fix the means of access, and strictly limit the examination to the workings of which it is necessary for plaintiff to have knowledge in order to make surveys and maps to elucidate the issues in controversy.
9. Under Code of Civil Procedure, Section 1317, requiring plaintiff to pay the cost of an inspection of the underground workings of mining property in controversy, an order granting such an inspection, and arbitrarily fixing the amount to be paid by plaintiff to defendant for lowering and hoisting plaintiff's agents engaged in such inspection at a certain sum, without hearing any evidence as to the actual cost, was erroneous.
10. Under Code of Civil Procedure, Sec. 1317, requiring the applicant for an inspection of mining property to pay all the expenses of examination, etc., an order requiring defendant to use its appliances to lower and raise plaintiff's agents in making such inspection, and providing the amount to be paid therefor, was not objectionable as taking or damaging defendant's property without just compensation.

APPLICATION for a writ of supervisory control by the state, on the relation of the Boston & Montana Consolidated Copper & Silver Mining Company, against the district court of the Second judicial district for the county of Silver Bow, and the Honorable William Clancy, judge of the Second department thereof. Writ granted.

STATEMENT OF THE CASE.

Application for writ of supervisory control. The action out of which this proceeding arose was commenced in November,

1902. Soon after the complaint was filed, the court, upon the application of the plaintiff, made an order requiring the defendant to produce for the inspection of the plaintiff, and to permit him to copy, certain letters, letterpress copies of letters, maps, stope sheets, stope books, books of account, and a lease and bond executed to the plaintiff by the Comanche Mining Company, all of which, it was averred, contained evidence relating to the merits of the action, and were in possession and control of the defendant. This order was afterwards annulled by this court because in excess of jurisdiction. (*State ex rel. B. & M. C. C. & S. M. Co. v. District Court*, 27 Mont. 441, 71 Pac. 602, 94 Am. St. Rep. 831.) The purpose of the action is to obtain a decree declaring the defendant a trustee of the legal title, for the benefit of the plaintiff, to an undivided three-fourths interest in the Comanche lode claim, situate in Silver Bow county. The ground of relief alleged in the original complaint was that the plaintiff in 1893 held a lease and bond upon the claim from the Comanche Mining Company, the owner of it, under the terms of which he had a right to extract ore from the claim for the period of one year by paying certain royalties thereon, with an option to purchase it at any time within the year upon payment of \$200,000; that the claim was of great value; that he sold an undivided one-fourth interest therein to one Allen; and that thereafter he had been induced to part with his remaining interest to the defendant for a grossly inadequate consideration by the fraud and misrepresentations of the defendant and others acting in its behalf, including his co-tenant, Allen, whereby the defendant became the successor in interest to the Comanche Mining Company. An accounting of ores extracted by the defendant was also demanded. After the order was annulled, plaintiff made another application to the district court in conformity with the views expressed by this court. This was filed, after notice to defendant, on March 7, 1903. For some reason it was not heard until November 14, 1903. In the meantime the plaintiff had filed an application for leave to amend his complaint. While the application was

pending, and on September 19th, he filed a second motion for inspection, supported by affidavit, which, besides iterating the facts alleged in support of the pending application for inspection, alleged facts tending to show a necessity for an inspection of other documents, etc., mentioned in the proposed amended pleading, and also of the underground workings of the Comanche claim. This motion asked for an order permitting an inspection of the workings. A copy of the proposed amended pleading was attached to the motion. On September 19th the amended complaint was ordered filed, and it was filed on September 26th. Issues were made up by an answer of defendant filed October 17th, and by reply thereto by the plaintiff, filed on November 17th. The ground for relief stated in the amended complaint is that the plaintiff in the year 1893 held a lease and bond for one year upon the east 500 feet of the Comanche claim; that under the terms of another agreement, which was a part of the same transaction, he was given an option to purchase all the stock of the Comanche Company within the year, upon payment of \$200,000; that the instrument embodying the latter agreement, to which all the stockholders of the Comanche Company were parties, was deposited with the stock in bank, to be delivered to the plaintiff upon the payment of \$200,000 as therein provided; that thereafter he had other negotiations with the company and the stockholders, and as a result it was agreed that he should have a lease of the whole claim for a year from April 1, 1893, and an option to buy it for \$200,000 at any time prior to October 1, 1893; that, upon the execution of the lease and option upon the stock of the company, he entered into possession of the leased portion of the claim, and continued in the development thereof until May 24, 1893, when he assigned an undivided one-fourth interest in his lease and option to one Allen; that thereafter the plaintiff and Allen engaged in developing the claim as co-tenants; that prior to October 1, 1893, he was induced to part with the remaining undivided three-fourths interest in these agreements to Joseph A. Coram and Charles Palmer for a grossly inadequate considera-

tion, upon false and fraudulent representations by them and said Allen as to its value; and that, by means of this fraud, to accomplish which the defendant and Coram, Palmer and Allen conspired together, the defendant became the successor in interest of the Comanche Mining Company. It is further alleged that during the time the plaintiff held the lease and bond and the other agreement referred to, and was engaged in developing the property, the defendant was engaged, though without plaintiff's knowledge, in removing ore from the claim by means of underground workings through the Dayton, West Colusa and Mountain View claims, properties belonging to the defendant and adjacent to the Comanche claim, and that since it obtained title to the property it has continued to extract ore, which in the aggregate has amounted to many hundreds of thousands of dollars in value.

The answer denies many of the material allegations of the complaint, and sets forth affirmative defenses—among others, laches on the part of plaintiff, and the statute of limitations.

On November 14th the court heard both applications, treating them as one, and, after having them under advisement until January 27, 1904, granted the order to meet the requirements of the issues made up by the amended pleadings. The material portions of the order are the following:

“Ordered that, within five days after the service upon the defendant of this order, the defendant produce at its office, in the city of Butte, for the inspection of plaintiff, and that it permit the plaintiff to have an inspection of, the following described documents, books and papers, to-wit: (1) All letters written by any of the executive officers of the defendant company, or the company, at Boston, Massachusetts, to the said defendant company or to its superintendent or managing officer at Butte, Montana, or to Joseph A. Coram, which relate to the Comanche mining claim, or the purchase thereof or the acquisition of any interest therein by the defendant company, written between March 1, 1893, and August 30, 1893, or in relation to the stock, or the purchase of the stock, of the Comanche Min-

ing Company, and written between April 1, 1893, and April 1, 1894; also all letterpress copies of said letters; and the said defendant is hereby required to produce the same for the inspection of the plaintiff, whether the same are in the state of Montana or outside of the state of Montana. (2) All letters written by the defendant company, or the superintendent or managing officer of the company, at Butte, Montana, or by Joseph A. Coram, to the said defendant or any of its officers at Boston, Massachusetts, in relation to the Comanche mining claim, or the purchase of the Comanche mining claim or the acquisition of any interest therein by the defendant company, and written between the 1st day of March, 1893, and the 30th day of August, 1893, or in relation to the stock of the Comanche Mining Company, or the purchase of said stock, and written between the 1st day of April, 1893, and the 1st day of April, 1894, and also all letterpress copies of the same. (3) The account kept by the defendant company with the Comanche mine, showing the receipts and disbursements by it on account thereof. (4) All stock transfer books of the Comanche Mining Company, so far as the same show the transfer of any stock of the Comanche Mining Company between the 10th day of August, 1893, and the 1st day of April, 1894. (5) The lease of the east five hundred feet of the Comanche mining claim, executed by the Comanche Mining Company to the plaintiff in the year 1893. (6) That certain instrument executed by the plaintiff bearing date on or about the 27th day of March, 1893, under the terms of which the plaintiff was entitled to purchase the stock of the Comanche Mining Company for the sum of \$200,000 or thereabouts.

“And it is further ordered that the defendant permit the plaintiff, by two mining engineers and three assistants, to make an inspection and survey of all workings in the Comanche mining claim, and that, for the purpose of making such inspection and survey, the defendant permit any two mining engineers to be named by the plaintiff, together with three assistants, to have free access to all of the workings in the said Comanche min-

ing claim for a period of thirty (30) days, and to permit such engineers and their assistants to pass through any mining claims owned by the defendant adjacent to the said Comanche mining claim, necessary to be passed through in order to reach the workings of the said Comanche mining claim, or any of them.

“And it is further ordered that the defendant at all reasonable times during the said period lower the said engineers, with their assistants, and hoist them to the surface, in order that they may enter the said workings in the Comanche mining claim, and make their exit to the surface from the same, through such hoists and shafts operated by the defendant on the said Comanche mining claim, or on any claims adjacent thereto, as are usually and customarily employed by the defendant in lowering its men to the workings in the said Comanche mining claim, and in hoisting them to the surface on their making their exit from the same, and that the plaintiff pay the cost of such lowering and hoisting, which the court finds to be \$5.”

Mr. A. J. Shores, Mr. C. F. Kelley, and Messrs. Forbis & Evans, for Relator.

Mr. T. J. Walsh, for Respondents.

MR. CHIEF JUSTICE BRANTLY, after stating the case, delivered the opinion of the court.

1. It is argued by counsel for the relator that the order is void for the reason that it was premature, in that it was made with reference to issues not involved in the cause until after the application for it was filed. Under this condition of the case, they say the proceeding should have been begun *de novo*; in other words, that, the pleadings having been amended and the issues changed pending the application, the court was without authority to act upon it. Their argument proceeds upon the assumption that, after the amended complaint was filed, the pleadings presented a case entirely different from that presented by the original pleadings, and hence that the order was the re-

sult of an application made when no action was in fact pending, within the rule laid down in *State ex rel. B. & M. C. C. & S. M. Co. v. District Court*, 27 Mont. 442, 71 Pac. 602, 94 Am. St. Rep. 831, and *State ex rel. Mendenhall v. District Court*, 29 Mont. 363, 74 Pac. 1078. This contention cannot be sustained. The purpose of the action is to have defendant declared a trustee, for the benefit of the plaintiff, of an interest in the Comanche claim. Under the allegations in the original complaint, the right to recover depended upon the plaintiff's ability to establish a fraudulent conspiracy by the defendant with Coram, Palmer and Allen, by means of which he was induced to part with his interest for an inadequate consideration. This is also the theory of the amended complaint. The interest involved is the same, the wrong complained of is the same, and the evidence necessary to determine the rights of the parties will be the same, except that the particulars of the negotiations and the resulting agreements by which the plaintiff acquired rights in the property are in some respects different from those stated in the original complaint, and, so far as they are different, demand other evidence to establish them. On the main issue, however—that of fraud—the evidence required will be the same.

The defendant appeared and resisted the motion for the order upon its merits. No objection was then made that the required formalities of demand and notice had not been fully complied with. The action was pending; not only that, but all the issues had been fully made up. It is apparent from the affidavits on file what issues were tendered by the amended complaint, and what evidence relating to the cause of action stated therein was desired. It appears from them, also, that the evidence sought was not in the possession of the plaintiff, but in the control of the defendants, and that in fact it relates to the merits of the action. It further appears that at the time the alleged fraudulent conspiracy was formed and carried out, and plaintiff was induced to part with his interest, the defendant was engaged in removing ore from the claim, and that, in order to determine

this fact, as well as the amount and value of it, an inspection of the underground workings in the claim was necessary.

So far as concerns the accounting, the granting of this portion of the order might well have been deferred until a determination of the main issue in the case, for the right to an accounting will, in any event, depend upon plaintiff's right to recover. Yet the fact that the defendant had removed and was engaged in removing ore at the time when the alleged fraud was perpetrated also relates to the main issue in the case, and will perhaps be competent, as supplying, in part, at least, proof of the motive underlying the alleged conspiracy.

The statute under which the application was made for the inspection of the writings (Code of Civil Procedure, Sec. 1810) provides that the court in which the action is pending, or the judge thereof, may, upon notice, order either party to give the other, within a specified time, an inspection, etc. Inasmuch as the defendant appeared and resisted the application upon its merits, without objection that the proper notice had not been given, it is not now in position to make the objection that the order was prematurely made. If it be conceded that the notice given prior to the actual filing of the amended pleading was insufficient to warrant the court's proceeding to make the order, under the circumstances detailed, the defendant must be held to have waived this informality. The validity of the order must therefore be determined by an examination of the merits of the showing made at the time it was granted, and in view of the issues then presented.

2. It is said that the order is void because the statements contained in the affidavits in support of the motion and in the amended complaint are made upon information and belief. Under the statute, in order to warrant compulsory inspection of papers, it must appear (1) that an action is pending, and that the mover is a party; (2) that the evidence sought is in the possession or control of the adverse party; and (3) that it relates to the merits of the action, if the mover is the plaintiff, or to the defense, if the mover is the defendant. The evident

purpose of it is to enable the party applying to the court to obtain evidence relating to, or necessary to support his side of, the controversy, and not a disclosure of the evidence upon which his adversary relies.

The showing made by the moving papers in this case is upon information and belief of the plaintiff, both as to the existence of the letters and copies, and as to the possession of them and the other documents referred to in the motion. So, also, as to the removal of ore. The facts upon which the plaintiff's information and belief are based are not stated. The defendant, by its agent, appeared at the hearing, however, and filed a counter affidavit. This controverts none of the statements contained in the plaintiff's affidavits, except that it states that the defendant has not in its possession within the state of Montana any of the records, letters, books or documents in question, and that such agent verily believes that none of them can be found. It further denies positively that the stope books, stope sheets and maps are in existence anywhere. The affidavit therefore virtually admits that, while the records, letters, books and documents are not in the possession of the defendant in the state of Montana, they are elsewhere. Under this condition of affairs, the district court was justified in assuming that the lease and option, and the letters, letterpress copies, records and accounts of the Comanche Company are in the possession of the defendant, and that they contain evidence relating to the merits of the action. The court was also justified in drawing the inference that, at the time the plaintiff parted with his interest in the property, the defendant was engaged in removing ore from it. That the court acted upon this inference is clear from the fact that the order does not include an inspection of the stope sheets, maps, etc., which were embraced in the specific denial. In view of the silence of the defendant, under the circumstances, it was properly held to have admitted the allegations of the plaintiff in support of his motion, though made upon information and belief. (*Justice v. National Bank*, 83 N. C. 8; *McDonald v. Carson*, 95 N. C. 377; *Bundschu v. Simon*, 23

Civ. Proc. R. 80, 23 N. Y. Supp. 715; *National Oleo Meter Co. v. Jackson*, 54 N. Y. Super. Ct. 444.)

It thus appears that the evidence sought is desired for use in a pending action, that it is in the possession of the defendant, and that it relates to the merits of the cause of action stated by the plaintiff. This brings the application within the rule laid down in *State ex rel. Mendenhall v. District Court*, and *State ex rel. B. & M, C. C. & S. M. Co. v. District Court, supra*.

It is not indispensably necessary that the moving party show that the evidence sought may not be obtained from other sources—as, for instance, from an examination of witnesses. Allegation and proof of this fact were not required to sustain a bill of discovery under the old equity practice (*Marsh v. Davidson*, 9 Paige, 580; *Arnold v. Pawtuxett Valley Water Co.*, 18 R. I. 189, 26 Atl. 55, 19 L. R. A. 602); nor does the statute require it. We are not disposed to adopt a more stringent rule under the statute. If it appears that the evidence relates to the cause of action or defense and is in possession of the adverse party, this is sufficient to support the application, the purpose of the statute being to avoid the cumbersome and expensive process by the old bill of discovery. If it is apparent that the evidence may be readily obtained from other sources, and that the order is not sought in good faith, the court should deny the application.

3. The order is too broad in some respects, and defective in others. But we think we may direct the district court to amend and correct it in these particulars without requiring the application to be made *de novo*. The statute clearly requires that the court shall not only fix the time at which the inspection shall begin, but also the time within which it shall be completed. For its words are “within a specified time,” indicating that the inspection must not be extended over a longer time than may be reasonably necessary under the facts of the particular case, to be fixed by the court, and not left to the discretion of the moving party. (*State ex rel. B. & M. C. C. & S. M. Co. v. District court, supra*.) In that case it was held that the order

was void because no limitation was fixed. That decision was upon *certiorari*, however, and this court may not under that writ undertake to control further proceedings in the district court, or direct what order shall be entered. 4 Ency. Pleading & Practice, 302. In this proceeding the court is not restricted to the narrow rules regulating its powers under that writ, and may direct the inferior court as to its further action upon the application; even requiring, if necessary, the hearing of other evidence, in order that it may grant the proper relief upon the particular application. (*State ex rel. Parrot S. & C. Co. v. District Court*, 28 Mont. 528, 73 Pac. 230.)

It will be noted that the order includes not only the original letters in possession of the defendant, but also letterpress copies of them. It is not necessary that the inspection should extend to the letterpress copies. In no event should it extend further than the necessities of the case require.

The order is also too broad in that it extends the inspection to all letters "which relate to the Comanche claim or the purchase thereof, or the acquisition of any interest therein," and also "in relation to the stock of the Comanche Mining Company or the purchase of said stock." The fact that the application demands inspection of documents and letters which are apparently not pertinent to the issues involved does not prevent the granting of an order as to those matters which are pertinent, but the order should not include anything else. So far as it does, it permits the moving party to make a fishing examination of the private papers of his adversary, and thus to violate his constitutional guaranty of security from "unreasonable search and seizure." In this respect, also, the order is an unnecessary invasion of defendant's rights. The inspection should have been limited strictly to such of the correspondence only between the executive officers of the defendant and its agents through whom the purchase was made as relates to the acquisition of title. Other letters relating to the claim itself or the stock of the company, touching matters not connected with the acquisition of title to them by the defendant, cannot in any case be deemed

pertinent to the plaintiff's case, and it was clearly beyond the power of the court to order an inspection of any of them.

In the portion of the order granting an inspection of the underground workings of the Comanche claim, the court exceeded its power in two respects. The defendant is required to permit the inspection of these workings "through such hoists and shafts operated by the defendant on the Comanche claim, or any claims adjacent thereto as are usually and customarily employed by the defendant in lowering its men to the workings in the said Comanche claim, and in hoisting them to the surface on their exits from the same." It is apparent that this provision of the order leaves it to the choice or caprice of the plaintiff to demand of the defendant access to the workings by such openings as he may deem convenient, and through any adjacent claim of the defendant, whereas the means of access necessary should have been determined and fixed by the order itself, strictly limiting the examination to the workings of which it is necessary for the plaintiff to have knowledge, and to make surveys and maps; thus protecting the defendant from an inspection of workings not involved in the controversy.

Again, the court fixed the cost of lowering and hoisting the agents of the plaintiff while engaged in the inspection of the claim, without hearing evidence. This was entirely arbitrary and unwarranted, to the same extent that it would have been error to require the defendant to lower and hoist the inspectors without requiring the plaintiff to pay the costs of the inspection. (Code of Civil Procedure, Sec. 1317; *State ex rel. Parrot S. & C. Co. v. District Court, supra.*) The relator presses upon our attention this feature of the order, and contends that the requirement that the defendant shall lower and hoist the agents of the plaintiff into and from the underground workings by means of its own appliances is in contravention of Section 1 of the fourteenth amendment of the Constitution of the United States, prohibiting the deprivation of property without due process of law, and also of the provision of the Constitution of the state prohibiting the taking or damaging of private property

without just compensation first made to the owner thereof. (Constitution, Art. III, Sec. 14.) This contention was disposed of in *State ex rel. Parrot S. & C. Co. v. District Court, supra*. What is there said we think is conclusive. It would be idle to hold that the district court may make these orders of inspection, and then, by giving to the constitutional provisions the construction contended for by the defendant, say that it is powerless to carry them into effect. The power to make such orders implies the power necessary to make them effective, and the mere temporary, though enforced, use of the appliances in possession of the adverse party, without which access to the property must be impossible, is not in violation of the constitutional guaranty referred to.

The district court is therefore directed (1) to amend its order by fixing a time not only at which the inspection of papers is to begin, but the length of time during which it is to continue; (2) to exclude therefrom letterpress copies of the letters referred to, as well also all letters not relating directly to the acquisition by defendant of the Comanche claim and the stock of the Comanche Mining Company; (3) to modify the order by designating the particular shaft through which it may be necessary for the plaintiff's agents to go in order to inspect the underground workings of the Comanche property, and, if it appears that access may be had to all the workings through the Comanche shaft, to limit the right of access through that exclusively; and (4) to ascertain what will be the reasonable cost of the use of the appliances at the time for the making of the inspection, and require payment thereof by the plaintiff. In order to amend and modify the order in conformity with these directions, the court is directed to hear such further testimony as may be necessary.

MR. JUSTICE HOLLOWAY: I agree with the majority of the court in the views expressed above, except as to the fourth modification enumerated. This feature of the case presents the same question as that determined in paragraph 5 of the opinion

in *State ex rel. Parrot S. & C. Co. v. Dist. Court*, 28 Mont. 528, 73 Pac. 230, and I dissent from the views of the court expressed as to this modification, for the reasons stated in my dissenting opinion in that case, found at page 547.

MCMILLAN ET AL., APPELLANTS, v. CITY OF BUTTE ET AL., RESPONDENTS.

(No. 1,843.)

(Submitted March 26, 1904. Decided April 12, 1904.)

*Municipal Corporations — Taxation — Street Improvements—
Special Assessments Upon Property Specially Benefited—
Due Process of Law.*

1. Session Laws 1897, p. 219, Section 30, providing that when a street improvement is made the city council shall enact by ordinance that the expense shall be paid by the entire district created as previously provided, according to area, is not unconstitutional as depriving the property owner of his property without due process of law, in that such provision is a legislative declaration that all property in the proposed district is benefited by the improvement, and to the same extent.
2. In the absence of proof that the burden imposed on a property owner by a municipal assessment is altogether out of proportion to the benefit actually accruing to the property, he cannot assert that his property is thereby taken without compensation.
3. Where a certain lot was assessed for municipal improvements for its entire area, the fact that only half of such lot was included in the description in the resolution creating the assessment district was immaterial.
4. An alleged protest to street paving, filed by abutting owners, stating the reasons why they did not desire the paving done during the year 1898, and stating that they were willing to have the street paved during the year 1900, and that payment therefor should be required in three annual installments was not an unqualified protest to the paving required by Session Laws of 1897, p. 219, Section 31.

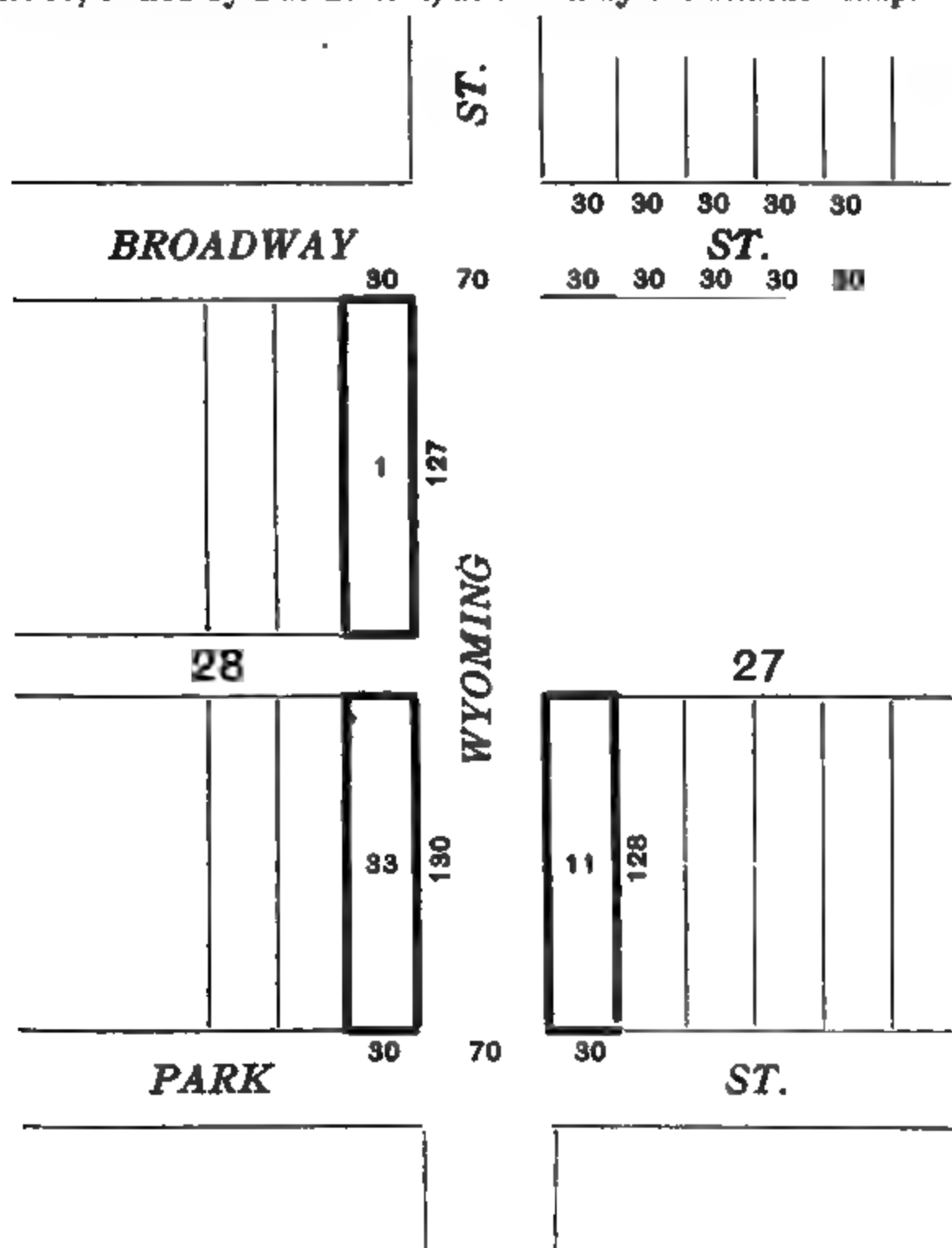
Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

ACTION by A. A. McMillan and others against the city of Butte and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

STATEMENT OF THE CASE.

On March 1, 1899, the city council of Butte proposed council resolution No. 230, creating an improvement district desig-

nated "No. 2" for the purpose of paving Wyoming street from Park street to Broadway, and appointed March 8, 1899, at 8 o'clock p. m., as the time when the council would hear objections to the final adoption of such resolution. Due publication of this resolution was made according to law. The property embraced in this proposed district which would be liable for assessment consists of lot 1, owned by Geoffrey Lavell, lot 10, owned by Miles Finlen, lot 11, owned by these plaintiffs, and lot 33, owned by Pat Tallent, as shown by the attached map.



In the description given of this property in resolution No. 230 lot 10 above is described as starting from the northwest corner, thence east 30 feet, thence south 132 feet to the southwest corner, thence west, etc. Prior to the meeting of the city council on March 8th, these plaintiffs, with Tallent and Lavell, owning together more than one-half of the area of the property which would be liable for assessment to pay for such improvement, filed with the city clerk the following writing, designated "Exhibit B":

"BUTTE, MONTANA, March 7th, 1899.

"To the Honorable Mayor and Council of the City of Butte, Montana—Gentlemen: We, your petitioners, respectfully protest against the paving of Wyoming street from Park street to Broadway street, and set forth the following reasons: That we have paid a considerable amount of money for paving done during the year 1898, and that our rents from the abutting property on said street is not large enough to meet any special tax for the year 1899. We therefore ask that the said street above named be not paved during this year. We set forth, however, that we are willing that the said street be paved during the year 1900, and that payments for the said paving be made in three annual payments.

"Very respectfully yours,

"Representing 128 feet—A. A. McMILLAN,

DAVID J. CHARLES,

"Representing 121 feet—PATRICK TALLENT,

"Representing 132 feet—G. LAVELL,

"Total 381 feet—By J. P. COLLINS,

"Agent."

Notwithstanding this writing, the council finally adopted this resolution, and on June 9, 1899, passed an ordinance to carry such resolution into effect and to make the improvement heretofore mentioned. On January 17, 1900, the council, by resolution No. 289, levied and assessed a tax upon the property in such district to pay for the improvement made, and due notice of such resolution was published as required by law. In this

notice, February 7, 1900, at 7:30 p. m., was designated as the time at which objections to the final adoption of this resolution would be heard. This resolution was adopted, and, these plaintiffs having failed to pay the first installment of the tax so levied, defendants undertook to enforce collection of the same, when this action was commenced to restrain the city and the city treasurer from proceeding further. An order to show cause why an injunction pending the litigation should not be granted was issued.

Defendants answered, admitting many of the allegations of the complaint, denying some, and pleading affirmative matter, which was denied in a reply. Upon the hearing oral testimony and documentary evidence were received, and at the conclusion the court denied the application for an injunction, and from this order the plaintiffs appealed.

Messrs. McBride & McBride, for Appellants.

The law under which the city of Butte purports to act in its attempt to levy an assessment against the property of plaintiffs is unconstitutional in that it results in depriving the plaintiffs of their property without due process of law. (Constitution of U. S., Art. V of the Amendments; Constitution of Montana, Art. III, Sec. 27; Dillon on Mun. Corp. Vol. 2, p. 756; Cooley on Taxation, p. 606; Hare on Constitutional Law, Vol. 1, p. 310, 312, 314, 315; *Stuart v. Palmer*, 74 N. Y. 183; *Kirby v. Shaw*, 19 Pa. 258; *Shenley v. Com.*, 6 Pa. 29; *Washington Ave. Case*, 69 Pa. 360; *City of Paterson v. Society*, 24 N. J. 385; *Tideater Co. v. Coster*, 3 C. E. Green, 51; *In re Drainage of Lands*, 35 N. J. 497; *St. John v. E. St. Louis*, 50 Ill. 92; *Lee v. Ruggles*, 52 Ill. 427; *Detroit v. Chapin*, (Mich.) 42 L. R. A. 638; *Village of Norwood v. Baker*, 19 Sup. Ct. Rep. 193; *French v. B. A. P. Co.*, 21 Sup. Ct. Rep. 625; *White v. City of Tacoma*, 109 Fed. 33-34.)

Mr. Edwin M. Lamb, and Mr. H. A. Bolinger, for Respondents.

MR. JUSTICE HOLLOWAY, after stating the case, delivered the opinion of the court.

Two questions only are presented for our consideration: (1) Appellants contend that the statute authorizing the creation of this improvement district and providing what property should be assessed to defray the cost of the improvement is unconstitutional, in that it deprives the appellants of their property without due process of law. (2) It is contended that the city had no authority to proceed further after appellants and the other property owners had presented to the council their written objections in Exhibit B, above.

1. The statute under which the city proceeded is known as "House Bill No. 204, Laws of the Fifth Legislative Assembly, approved March 8, 1897." (Session Laws 1897, p. 212.) Sections 30 to 36, inclusive, of this Act (pages 219-221) provide for the creation of these special improvement districts, designate the property which shall be assessed to pay for such improvement, and the method of collecting the tax. Section 30 provides that when such improvement is made the council shall enact by ordinance that the expense of such improvement shall be paid by the entire district, each lot or parcel of land within the district to be assessed for the part of the whole expense which its area bears to the area of the entire district, exclusive of streets, alleys and public places. An opportunity is afforded by Sections 31 and 35 for interested parties to object to the adoption of the resolution creating the district, and also to object to the adoption of the resolution levying the assessment. This Act is a legislative declaration that all the property in the proposed district is benefited by the improvement, and it also fixes the measure by which such benefit is to be ascertained.

The particular objections urged against it are that it fixes by arbitrary rule the proportion of the tax which a particular piece of property shall bear, and that it affords no opportunity to the property owner to show that in fact his property is not benefited to the extent of the tax imposed, and the following rule from 2

Dillon on Municipal Corporations, Sec. 761, Subd. 3, is urged as the only lawful measure by which these assessments can be ascertained: "(3) Special benefits to the property assessed—that is, benefits received by it in addition to those received by the community at large—is the true and only just foundation upon which local assessments can rest; and to the extent of special benefits it is everywhere admitted that the legislature may authorize local taxes or assessments to be made."

Much confusion and uncertainty have arisen from the diverse views expressed by different courts upon these statutes providing for special assessments to pay for improvements made by municipalities, and, no matter what rule has been adopted, great difficulty has been encountered in its application. Who shall determine what property is actually benefited, and the extent of that benefit? And is the property owner entitled to a judicial determination of these questions? In the paragraph succeeding the one quoted above, Dillon, in his work on Municipal Corporations, says: "(4) When not restrained by the constitution of the particular state, the legislature has a discretion, commensurate with the broad domain of legislative power, in making provisions for ascertaining what property is specially benefited, and how the benefits shall be apportioned."

If, then, there are no constitutional restrictions in the way (and we are unable to find any in the constitution of this state), and nothing in the nature and circumstances of the particular case to make an assessment upon the property benefited in proportion to its superficial area work a manifest injustice, it may now be regarded as settled as within the competency of the legislature to provide that the assessment shall be so made (Dillon on Mun. Corp. Sec. 761, Subd. 7; *Adams v. City of Shelbyville*, 154 Ind. 467, 57 N. E. 114, 49 L. R. A. 797, 77 Am. St. Rep. 484), and laws imposing this tax upon the property legislatively determined to be benefited, as in the Act under consideration, are not open to the objection that they deprive the owner of his property without due process of law. (2 Cooley on Taxation, 1181.)

After this doctrine had been announced by a great many courts, some doubt was created by the decision in *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, wherein expressions are found which apparently greatly limit the legislative power; but, when considered with reference to the facts of that particular case, much of the confusion is dispelled. However, the doctrine announced in that case gave rise to such uncertainty that numerous other cases involving practically the same questions as the one now under consideration were soon before that same tribunal for determination, and these led to an interpretation of that decision by the court which rendered it, and set at rest all controversy upon the subject. In *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879, the court reviews at length its former decisions, including the decision in *Norwood v. Baker*, above, and declares the law to be settled as now determined by the very great weight of authority, viz.: “ ‘Special assessments for special road or street improvements very often are oppressive. But that the legislative power may authorize them, and may direct them to be made in proportion to the frontage, area or market value of the adjoining property, at its discretion, is, under the decisions, no longer an open question’ ” [*Mattingly v. District of Columbia*, 97 U. S. 692]—and quotes with approval the following statement of the rule from Dillon on Municipal Corporations: “Whether the expense of making such improvements shall be paid out of the general treasury or be assessed upon the abutting or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited or alone upon the abutters according to frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency.” (2 Dillon on Municipal Corporations, 752.)

This decision was immediately followed by *Tonawonda v. Lyon*, 181 U. S. 389, 21 Sup. Ct. 609, 45 L. Ed. 908; *Webster v. Fargo*, 181 U. S. 394, 21 Sup. Ct. 623, 645, 45 L. Ed. 912; *Cass Farm Co. v. Detroit*, 181 U. S. 396, 21 Sup. Ct. 644, 645,

45 L. Ed. 914, and *Detroit v. Parker*, 181 U. S. 399, 21 Sup. Ct. 624, 645, 45 L. Ed. 917—in every one of which the decision in *French v. Barber Asphalt Paving Co.* is approved, and the doctrine there announced reaffirmed. The same court, in *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 15 L. Ed. 372, after a very careful consideration of the expression “due process of law,” reached the conclusion that that expression, as used in the Constitution of the United States, does not require that the assertion of the rights of the public against the individual or the imposition of burdens upon his property for the public use shall in all cases be done by resort to courts of justice; and this doctrine was reaffirmed in *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616. We are at least safe in saying that it may be regarded now as settled that, in the absence of a showing that the burden imposed by such assessments is altogether out of proportion to the benefit actually accruing to the property, the property owner cannot be heard to assert that his property has been taken from him without due process of law. (Elliott on Roads and Streets, Secs. 558-559.)

In the present instance there is no allegation or proof that in the proceedings which resulted in making the improvement complained of and in assessing the appellants' lot for a portion of the cost thereof there has been any disregard of the provisions of the statute, or any city ordinance, or that appellants' property has been charged differently from that of the other lot owners; nor is it alleged in the complaint that the portion of the cost of the improvement assessed against appellants' lots in point of fact exceeded the benefits especially accruing to their property by reason of such improvement having been made.

The complaint is made that only one-half of lot 10 was included in the resolution creating the district, but upon the hearing it was shown that as a matter of fact that lot had been assessed for its entire area, and that the assessments then due had been paid. So that, even assuming that a mistake was made in the description of lot 10 above, plaintiffs are not in a position

to complain, since they were not assessed for any greater amount than they would have been had the description been properly made.

2. Section 31, above, provides that the city council by resolution may create an improvement district; that due notice of such shall be given by publication of the resolution itself, which shall also designate the time when the council will hear objections to the final adoption of such resolution. Section 34 provides for a resolution levying the assessment on the property liable for the tax, and Section 35 provides for giving notice of this resolution, and affords an opportunity for the property owners to object to its final adoption. It is contended that when the owners of more than one-half of the area of the property liable to the assessment filed with the city council the writing Exhibit B, above, the council was thereupon shorn of any power to proceed further. Section 31 of the Act above, among other things, provides: "If at such meeting, objections are made to the making of such improvement, by owners or agents representing more than one-half in area of all the property which would be assessed to defray the cost of said improvement, the improvements shall not be made at that time." It is to be observed that the language of the statute is, "if at such meeting, objections are made to the making of such improvement," etc. The writing Exhibit B is not an objection of that character; on the contrary, the signers particularly say that they are willing that the contemplated improvement should be made during the year 1900. At most this writing can be designated properly only as a petition to the council setting forth the reasons of the petitioners why the improvement should not be made during 1899, or, more strictly speaking, why the tax for such improvement should not be exacted during 1899. It is worthy of note that there is nothing in the record to show when the proposed improvement was to be made, or when in fact it actually was made, except by inference it may be said to appear to have been done prior to January 17, 1900. There is no allegation in the complaint whatever showing when the improvement was made,

and the inference above only appears from the answer, while it does affirmatively appear that the assessment was levied in four installments due, respectively, November, 1900, November, 1901, November, 1902, and November, 1903; and, while the appellants allege in their complaint that they objected to the adoption of the resolution levying this assessment, this is specifically denied in the answer, and at the hearing no testimony whatever was offered by appellants in support of their allegation. So that upon the whole it cannot be said that the city council did not literally take these property owners at their word, and make the improvement to suit their convenience, as expressed in Exhibit B, above. Instead of Exhibit B being an objection within the meaning of Section 31, above, it is nothing more than a petition to the city council, which, so far as this record shows, was actually complied with by the council. The objection contemplated by Section 31 above can mean nothing less than an unqualified protest. Anything less than this falls short of an objection.

We find no error in the record. The order is affirmed.

Affirmed.

Rehearing denied May 24, 1904.

GROGAN ET AL., RESPONDENTS, v. VALLEY TRADING
COMPANY, LIMITED, APPELLANT.

(No. 1,825.)

(Submitted March 21, 1904. Decided April 12, 1904.)

Mortgage—Deed Absolute on Face—Release—Equity Jurisdiction—Limitations — Laches—Findings—Application of Payment—Theory of Complaint—Appeal.

30	229
81	327

30	229
38	417

30	229
139	481

30	229
140	176

1. Where a deed absolute on its face is given as security for a debt, and the grantee gives bond for a reconveyance on payment of the debt, the transaction is a mortgage, which the debtor is entitled, on payment of the debt, to have released by reconveyance.
2. Where a deed absolute on its face was given as security for a debt, in an action to redeem the court of equity will determine plaintiff's right of possession, where the defendant makes no claim to possession except under the deed.
3. Under the express provision of Code of Civil Procedure Section 558, the objection that an action was not commenced within the time limited by law can be taken only by answer.
4. Code of Civil Procedure, Section 518, providing that an action "for relief not hereinbefore provided for" must be commenced within five years, does not apply to actions concerning real estate.
5. Under Civil Code, Section 3780, providing that a party having an interest in property subject to a lien may redeem at any time after the claim is due and before his right of redemption is foreclosed, where no proceedings were ever instituted for foreclosure of a mortgage, the mortgagor, in bringing an action to redeem four years after the mortgagee went into possession, was not guilty of such laches as to deprive him of the right to relief.
6. Under the express provision of Code of Civil Procedure, Section 1114, no judgment can be reversed on appeal for want of a finding at the instance of a party who has not requested the findings, nor in cases of defects in the findings, unless exceptions have been made in the trial court as provided in Section 1115.
7. Under Civil Code, Section 2006, providing that where a debtor makes a payment which is equally applicable to two or more obligations it shall be applied according to the intention expressed by the debtor, or, if no such application is made, then the creditor may apply it to the extinction of any obligation, where several written instruments relating to the same indebtedness contained no provision for the order of payment, parol evidence was competent to show what application of a payment was agreed on.
8. Where a complaint alleged that a deed was given as security for a debt with certain chattel mortgages, and bond given for reconveyance on payment of the debt, that the transaction was a mortgage, and that the debt had been paid, and asked that the mortgage be canceled and satisfied by reconveyance of the property, a decree requiring a reconveyance was not a departure from the theory of the complaint, as awarding specific performance of the bond, since the bond merely constituted a part of the transaction with the other instruments.
9. The error in a finding that a deed was executed December 16, 1893, where, under the facts admitted, it was executed "on or about April 19, 1893," was harmless.

Appeal from District Court, Gallatin County; Wm. L. Holloway, Judge.

ACTION by Darius F. Grogan and another against the Valley Trading Company, Limited. From a judgment in favor of plaintiffs, and from an order overruling defendant's motion for a new trial, defendant appeals. Affirmed.

Messrs. Hartman & Hartman, and Mr. A. J. Walwrath for Appellants.

The objection that the complaint does not support the findings or the judgment or decree, or that the findings or judgment or decree are based upon a different theory from that taken by the pleadings, may be successfully urged for the first time in the supreme court. (*Gillette v. Hibbard*, 3 Mont. 412, 419; *Territory v. Virginia Post Road Co.*, 2 Mont. 96, 100; *Richards v. Lewisohn Bros.*, 19 Mont. 128, 130; *Tracy v. Harmon*, 17 Mont. 465, 467; *City of Helena v. Brule*, 15 Mont. 429, 432; *Foster v. Wilson*, 5 Mont. 53, 57; *Parker v. Bond*, 5 Mont. 1, 12; *Quirk v. Clark*, 7 Mont. 231.)

The judgment or decree should conform to the theory of the complaint or the pleadings, and if it does not, but is based upon some other theory, it will be reversed in the supreme court. The same rule applies to the findings and decision of the court or the verdict of the jury. (*Talbot v. Water Co.*, 73 Pac. 1111, 1112; *Harris v. Lloyd*, 11 Mont. 390; *Baldwin v. Ins. Co.*, 124 Fed. 206; *Benedict v. Bray*, 2 Cal. 251; *Kiskaddon v. Jones*, 63 Mo. 190; *Reynolds v. Stockton*, 140 U. S. 254; *Putnam v. Lamphier*, 36 Cal. 151; *Backman v. Sepulveda*, 39 Cal. 688; *Demick v. Cudihy*, 72 Cal. 110; *Jackson v. Miles*, 94 Ga. 484; *Boardman v. Griffin*, 52 Ind. 101; *Stone Co. v. Crofton*, 4 Ind. App. 571; *Bennett v. Smith*, 40 Mich. 211; *Bank v. Virgin*, 36 Neb. 735; *Perkins v. Mining Co.*, 10 Nev. 405; *Graham v. Read*, 57 N. Y. 681; *Arnold v. Angell*, 62 N. Y. 508; *Mower & Reaper Co. v. Thayer*, 50 Hun. 516; *Springer v. Westcott*, 87 Hun. 190; *Parsley v. Nicholson*, 65 N. C. 207; *Davis v. Hinchcliff*, (Wash.) 34 Pac. 915; *Gage v. Allen*, 84 Wis. 323; *Hendryx v. Perkins*, 114 Fed. 801.)

Respondents were guilty of gross laches in the pursuance of their remedy, and the complaint offers no excuse for the delay in commencing the action; laches must be excused in the bill to entitle the plaintiff to recover, and failure to so excuse it is fatal to the action. (*Wolf v. Great Falls, etc. Co.*, 15 Mont. 49; *Badger v. Badger*, 2 Wall. 87; *Marsh v. Whitmore*, 88 U. S. 178; *Boyd v. Wyley*, 8 Fed. 355; *Supervisors v. Drainage*

Co., 52 Ill. 299; *Champau v. Chene*, 1 Mich. 400; *Bertine v. Varian*, 1 Edw. Ch. 343.)

Mr. J. W. Staats, and *Mrs. Ella Knowles Haskell*, for Respondents.

MR. COMMISSIONER POORMAN prepared the following opinion for the court:

This is an appeal from a judgment in favor of plaintiffs and from an order overruling defendant's motion for a new trial.

The complaint was filed September 8, 1900, and alleges the copartnership of plaintiffs; the incorporation of defendant; the continued ownership by plaintiffs since October, 1892, of lots 5 and 6, block 4, Crescent Addition in the town of Belgrade; an indebtedness of plaintiffs on April 18, 1893, to one John R. Watson, in the sum of \$2,522, which included \$300 plaintiffs then owed to the Belgrade Mercantile Company as the purchase price of the lots above named, and which were held by plaintiffs on a contract of sale; that plaintiffs gave to Watson their promissory note on that day for said sum, and executed as security therefor a certain chattel mortgage; that Watson paid the \$300 to the Belgrade Mercantile Company, and took the deed to said property in his own name as additional security, and not otherwise, for the payment of the said note; that Watson executed and delivered to the plaintiffs a certain bond by which he agreed to convey these lots to plaintiffs upon their payment to him of the sum named in said note, said note and chattel mortgage being specifically mentioned in said bond; that on December 16, 1893, the plaintiffs renewed this note, which then amounted to \$2,595.87, and executed to Watson their certain other chattel mortgage as security for the payment thereof; that on the last named day Watson executed and delivered to the plaintiffs his bond for a deed to the lots in question, providing that if plaintiffs should, on the 1st day of October, 1894, pay to said Watson the sum of \$450, with interest at the rate of one per cent.

per month from date, he would reconvey said property to the plaintiffs; that the \$450 provided for in this last-named bond was a part of the \$2,595.87 named in the last note; that on August 10, 1894, the plaintiffs, in renewal of the former notes and mortgages, executed to Watson their certain other promissory note for \$2,630.46; that this last named note was paid by plaintiffs and the said indebtedness satisfied between November, 1894, and March, 1895, and demand made of said Watson to reconvey said real property, but that he refused to make such reconveyance; that all of these various acts were parts of the same transaction; that on the 3d day of March, 1899, one A. H. Priest, an alleged assignee of the said Watson, pretended to sell and convey this property to the defendant, and that defendant at the time of such conveyance and prior thereto had full notice of the rights of these plaintiffs; that the conveyance of these lots by the said Belgrade Mercantile Company to said Watson was intended by the plaintiffs and by Watson as a mortgage upon said property, and not otherwise, and that upon the payment by plaintiffs to Watson of the sum of \$450 the mortgage should, in effect, be canceled and satisfied by reconveyance of the property from him to these plaintiffs; and that defendant has been in the continued possession of the property since the 3d day of March, 1899, and received and enjoyed the rents and profits from the same, which were of the reasonable value of \$15 per month. The plaintiffs demand an accounting, a conveyance and general relief.

To this complaint the defendant, by its attorneys, Walrath & Byam, filed a demurrer, in which they allege that Priest, as the assignee of Watson, conveyed the property by warranty deed to defendant; that the complaint does not state facts sufficient to constitute a cause of action, and is indefinite. This demurrer was overruled, and the defendant then answered, denying the allegations of the complaint.

At the trial of the action the defendant admitted everything alleged in the complaint except the payment of the note of August, 1894. The court found that the plaintiffs were, and

had been since August 1, 1892, the owners of the lots in question, and that the deed which the plaintiffs had caused to be executed to Watson was a security for \$450 of said indebtedness; that the same had been paid by the plaintiffs on or prior to March, 1895; that defendant had been in possession of the property since March 3, 1899; and that the fair rental value thereof was \$7 per month. The conclusions of law are to the effect that the defendant had notice of the equities of the plaintiffs; that plaintiffs were entitled to a reconveyance, and were entitled to recover the rental value of \$7 per month. Judgment was entered in accordance with these findings and conclusions and for the actual possession of the property.

1. The action is evidently one to have a deed declared a mortgage, for an accounting, and for leave to redeem. The only question of fact presented is as to the payment. And the only part of the indebtedness necessary to be considered is that which relates to the real estate in question. Under the evidence and the facts stated in the complaint and admitted this entire transaction, so far as it relates to this real estate, is a mortgage. As against the plaintiffs only the naked legal title to the land passed to Watson; he merely taking the deed to the land, and holding the same as a mortgage. It was certainly within the authority of the contracting parties, to-wit, plaintiffs and Watson, to make a valid agreement between themselves as to the amount of this indebtedness which should be charged against this land security; and their last agreement on this subject was the \$450 bond, which was recorded. The court properly found that this indebtedness had been paid. Whether the remainder of the last note had been paid is immaterial, so far as the rights of this defendant are concerned. The indebtedness for which the land was held as security having been paid, the plaintiffs became, as a matter of right, entitled to have the mortgage released, and where the mortgage is in the form of an absolute deed the proper form of a release is by conveyance. (*Adair v. Adair*, 22 Ore. 115, 29 Pac. 193; *Miller v. Thayer*, 74 Cal. 351, 16 Pac. 187; *Beach v. Cooke*, 28 N. Y. 508, 86 Am. Dec. 260.)

2. It is claimed that the plaintiffs are not in this action entitled to a decree awarding them possession of the property; that such decree could only be granted in an independent suit for possession. Proceedings to redeem are everywhere recognized as equitable ones (17 Ency. Pl. & Pr. 947), and, while equity will not pass upon purely legal questions, or determine the right of possession when these matters are the principal questions involved, yet where the possession necessarily follows as of course and of right from the purely equitable questions properly presented and decided, the party will not be required to institute another suit in another forum, but will be given complete relief by the chancery court. As stated by Lord Nottingham in *Parker v. Dee*, 2 Ch. Cas. 200: "Where this court can determine the matter, it shall not be a handmaid to other courts, nor beget a suit to be ended elsewhere." In *Ober v. Gallagher*, 93 U. S. 199, 23 L. Ed. 829, the court says: "Having obtained rightful jurisdiction of the parties and the subject-matter of the action for one purpose, the court will make its jurisdiction effectual for complete relief." "When a court of equity acquires jurisdiction of a suit for the purpose of determining whether or not a conveyance is in fact a mortgage, it will retain its jurisdiction for the purpose of adjusting all differences between the parties growing out of the transaction." (*Lane v. Beitz*, 99 Ill. App. 342; *Posten v. Miller*, 60 Wis. 494, 19 N. W. 540; *Prickett v. Muck*, 74 Wis. 199, 42 N. W. 256; *Gerrish v. Black*, 109 Mass. 474.) See, also, *McConnell, Adm'r, et al. v. Combination M. & M. Co. et al.* (decided by this court on the 12th day of April, 1904), 30 Mont. 239, 76 Pac. 194. In this case the only right to the possession which the defendant claims is under and by virtue of his conveyance from the assignee of Watson, and it has been found that the conveyance which Watson held, though a deed absolute on its face, was in fact a mortgage. The defendant had succeeded to the rights of Watson in the property (*Posten v. Miller, supra*). and as the plaintiffs, under the showing here made, would have been entitled to a conveyance from Watson, they are entitled

to the same thing from the assignee of Watson, the defendant in this action, who took the property with full knowledge of the equities of plaintiffs. The allegations of the complaint are somewhat incomplete as to the character of conveyance from Priest to the defendant, but the defendant supplies this deficiency by alleging specifically the character of this conveyance, to-wit, a warranty deed. (*Lynch v. Bechtel*, 19 Mont. 548, 48 Pac. 1112; *Crowder v. McDonnell*, 21 Mont. 373, 54 Pac. 43.)

3. It is also contended that the action is barred by the statutes of limitation; but this question was not raised by the pleadings, as required by Section 558 of the Code of Civil Procedure. Furthermore, it was held in *Burt v. Cook Sheep Co.*, 10 Mont. 571, 27 Pac. 399, that Section 518, Code of Civil Procedure, cited by appellant, does not apply to actions concerning real estate.

4. It is further contended that plaintiffs have been guilty of laches in bringing this action. It is apparent from this record that neither the defendant nor its predecessor in interest ever instituted any proceeding for the foreclosure of this mortgage on this land, and a party having an interest in property subject to a lien has a right to redeem from the lien at any time after the claim is due and before his right of redemption is foreclosed. (Section 3780, Civil Code.) No claim of adverse possession could be sustained under the facts appearing in this record.

5. It is further contended that the court should have made a finding as to whether the entire indebtedness had been paid. It appears, however, that no request was made for such finding, and the same cannot be complained of now. (Sections 1114, 1115, Code of Civil Procedure; *Yellowstone Nat'l Bank v. Gagnon*, 25 Mont. 268.) Furthermore, such a finding would be immaterial.

6. It is also claimed by appellant that the court erred in admitting testimony as to an agreement between respondents and Watson respecting the application of the first moneys paid on this indebtedness. The several written instruments relating

to the same indebtedness not providing for the order of payment nor making any reference thereto, parol evidence was competent to show what, if any, application of the proceeds of the personal property was agreed upon. (Section 2006, Civil Code; *Clarke v. Scott*, 45 Cal. 86; *Eppinger v. Kendrick*, 114 Cal. 620, 46 Pac. 613; *Benj. on Sales*, (4th Am. Ed.) Sec. 1103 *et seq.* and note.)

7. It is further claimed by appellant that plaintiffs had executed divers and sundry chattel mortgages on 300,000 pounds of grain, which plaintiffs claim was seized and appropriated by Watson. This may all be true, but there is no evidence that this other indebtedness was paid from the grain seized by Watson.

8. We cannot agree with appellant's contention that the court departed from the theory of the complaint, and awarded specific performance of the bond. If the bond were a separate transaction, there might be force in this contention; but the bond, the note and the chattel mortgage are separate parts of one transaction. The bond is the written agreement between the parties as to the amount of the indebtedness which should be charged against the real estate.

9. The finding of the court is open to the construction that the deed from the Belgrade Mercantile Company to Watson was executed December 16, 1893. Under the facts admitted this deed was executed "on or about April 19, 1893." This error, however, is not prejudicial to defendant.

We have found no reversible error in the case, and recommend that the judgment and order be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order appealed from are affirmed.

MR. JUSTICE HOLLOWAY, being disqualified, takes no part in this decision.

ROWE, RESPONDENT, v. SHANNON, APPELLANT.

(No. 1,833.)

(Submitted March 23, 1904. Decided April 12, 1904.)

Appeal—Affirmance.

Where the instructions fairly presented to the jury the questions involved, and the evidence is conflicting and is amply sufficient to sustain the verdict, and no reversible error is apparent, the case will, on appeal, be affirmed.

Appeal from District Court, Cascade County; Jere B. Leslie, Judge.

ACTION by Martin Rowe against Thomas Shannon. From a judgment for plaintiff, and from an order overruling defendant's motion for a new trial, defendant appeals. Affirmed.

Mr. George H. Stanton, for Appellant.

MR. COMMISSIONER POORMAN prepared the following opinion for the court:

This action was originally commenced in a justice's court by the filing of an account in which the plaintiff alleged that the defendant was indebted to him in the sum of \$52.50 for one and a half month's labor. The defendant made a general denial. The trial of the action resulted in a verdict and judgment for plaintiff. An appeal was taken to the district court, where a trial again resulted in a verdict and judgment for plaintiff. From the judgment, and from the order overruling defendant's motion for a new trial this appeal is taken.

But two questions are presented in this case: (1) Was the plaintiff employed to perform services for Shannon brothers or for the defendant, Tom Shannon? (2) Had plaintiff been paid for such services?

The defendant assigns as error certain instructions given by the court, as well as instructions refused. It is also claimed

that the court erred in refusing to admit in evidence certain matters offered by the defendant. The evidence rejected tended to show that certain property was assessed to Shannon brothers, and that no property was assessed to defendant, Tom Shannon.

These matters were wholly immaterial in this case. No good can be accomplished by a review of the objections made. The instructions given by the court fairly presented to the jury the questions involved, and the evidence is conflicting on the matters at issue, and is amply sufficient to sustain the verdict.

We have found no reversible error in the case, and recommend that the judgment and order be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion the judgment and order appealed from are affirmed.

McCONNELL ET AL., APPELLANTS, v. COMBINATION
MINING & MILLING COMPANY
ET AL., RESPONDENTS.

(No. 1,795.)

(Submitted February 13, 1904. Decided April 12, 1904.)

Corporations—Action Against Officers and Directors—Condition Precedent—Complaint—Powers—Ultra Vires—Minority Stockholders—Estoppel — Laches—Ratification — By-Laws—Legality—Salaries of Officers—Powers of Directors — Statutes — Evidence — Sufficiency — Admissibility—Equity.

1. Though a corporation is necessarily made a party to an action against its officers for fraudulently diverting and misappropriating its funds, and though the action is brought in the name of the plaintiffs, who are minority stockholders, it is in reality on behalf of the corporation.
2. Demand on the officials of a corporation to bring suit for fraud of officers and directors in misappropriating its funds is not a condition precedent to action by the minority stockholders.

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30	235
30	239
31	565
30	239
35	361

3. Though the allegations of the complaint in an action against the officers and directors of a corporation for fraudulently diverting and misappropriating its funds are not sufficient to entitle the action to be considered as brought on behalf of others than plaintiffs, who are minority stockholders, its sufficiency as an action in plaintiffs' own behalf is not impaired by averments that they bring it for others as well as themselves.
4. A court of equity, having obtained jurisdiction of an action for one purpose, may retain that jurisdiction for all purposes necessary to the complete protection of the plaintiff's rights.
5. In an action by minority stockholders against the officers and directors of a corporation for fraudulently diverting and misappropriating its funds, evidence examined, and *held* sufficient to charge the president and secretary with knowledge of all expenditures made, to whom they were made, and for what purpose.
6. Where a statute authorizes the organization of corporations thereunder for general mining purposes, but does not specify as one of the objects donations for political purposes, such donations are *ultra vires*.
7. Though the majority stockholders of a corporation sanction the acts of its directors and officials in illegally making expenditures of the corporate funds, so as to bind themselves by estoppel, yet such acts are not binding on stockholders who neither took part in the proceedings, nor sanctioned, by act or acquiescence, the making of the expenditures.
8. In the absence of power emanating from the stockholders, from statute, or from by-laws legally adopted, directors of a corporation have no authority to vote a salary to any of their number.
9. A resolution of four directors of a corporation voting three of their number salaries, and giving them back pay, predicated on by-laws previously passed by five directors, including the first mentioned four, is void, under Civil Code, Sections 2970-2976, providing that in all matters connected with his trust a trustee is bound to act in the highest good faith toward his beneficiary, and declaring that every violation of the provisions of the article is a fraud against the beneficiary.
10. Compiled Statutes of 1887, Fifth Division, Section 449, provides that, if a company is organized under that chapter for the purpose of carrying on any part of its business outside the state, the certificate shall so state, and shall also name the locality in the state where its principal place of business is located. *Held*, that the removal of the entire official business of a domestic corporation beyond the state, and acts of the directors in attempting to hold regular monthly meetings and to sit as the board of directors in another state, are *ultra vires*.
11. In an action against the officers and directors of a corporation for fraudulently diverting and misappropriating its funds, it appeared that, during a period of time in which the official business of the company had been removed from the state without authority of law, stockholders' meetings were held annually in the state for the purpose only of electing directors, at which a majority of the stock was represented. At each of these meetings a resolution was passed approving all acts of the directors and officers for the past year. None of the acts of which plaintiffs complain were presented at these meetings. The board of directors, after the suit was brought, at a regular meeting held in the state, passed a resolution ratifying the acts done without the state; some of the defendants voting for and causing its adoption. *Held* insufficient to show a ratification of the *ultra vires* acts.
12. Where a series of illegal acts by a corporation's officers and directors, continuing over a period of several years, is pursued till the commencement of an action against the officers and directors therefor by minority stockholders, laches cannot be predicated of the plaintiffs' delay in bringing suit.

13. Minutes of a stockholders' meeting, consisting of separate sheets of paper pinned to the leaves of a record book, are insufficiently identified to make them admissible.
14. Under Code of Civil Procedure, Section 3130, providing that, when part of a writing is given in evidence by one party, the whole on the same subject may be inquired into by the other, the act of plaintiffs, in an action against the officers and directors of a corporation for fraudulently diverting and misappropriating the corporate funds, in first introducing some insufficiently identified by-laws, though denying the legality of their adoption, renders the others admissible on behalf of the defendants.
15. Where the secretary of a corporation, who is unlawfully paid a salary by the directors, is not a director, and is connected in no way with the fraudulent transactions of the directors in misappropriating and diverting the corporate funds, he cannot be held liable in an action by minority stockholders against the officers and directors for relief against the fraudulent acts, but the officials who caused the money to be paid to him must account therefor.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

ACTION by O. J. McConnell, administrator of the estate of William Thompson, deceased, and others, against the Combination Mining & Milling Company and others. From a judgment for defendants, and an order denying a motion for a new trial, plaintiffs appeal. Reversed.

Mr. E. N. Harwood, and Mr. E. Scharnikow, for Appellants.

The decision is against law, because the attempted action of corporate trustees in voting salaries to themselves is void. "It would be a reproach to the administration of justice" to permit such action to stand. (*Butts v. Wood*, 37 N. Y. (Ct. of App.) 317; *Martin v. Santa Cruz Water Co.*, 36 Pac. 36; *Shattuck v. Oakland S. & R. Co.*, 58 Cal. 550; *Wickersham v. Crittenden*, 93 Cal. 17; *Wickersham v. Crittenden*, 106 Cal. 327; *Smith v. Los Angeles I. & L. Co.*, 78 Cal. 289; *Hardee v. Sunset Oil Co.*, 56 Fed. 51; *Jones v. Morrison*, 31 Minn. 140; *Miner v. Bell Isle Ice Co.*, 93 Mich. 97; *Hill v. Rich Hill Coal Co.*, 119 Mo. 9; *Ward v. Davidson*, 89 Mo. 445.)

Messrs. Forbis & Evans, for Respondents.

This action is one brought by plaintiffs on behalf of themselves and other stockholders similarly situated, upon causes of

motion which are alleged to have arisen in favor of the corporation, the Combination Mining & Milling Company, against its officers and directors. The right to sue primarily lay in the corporation, and the stockholders can only maintain the suit upon alleging and showing their inability to obtain relief through the corporation or its officers. Before a stockholder, in such a case, has any standing in a court of equity, he must first show that he has exhausted his remedies within the corporation. The plaintiff to state a cause of action must allege a request upon the directors, or other proper officers, to bring the action, a refusal by them, and then an application to the stockholders to furnish the relief; or else the plaintiff must show that such application to the directors and stockholders would be useless. (Thompson on Corporations, Sec. 4499; Clark & Marshal on Private Corporations, Sec. 543; *Brewer v. Boston Theater*, 104 Mass. 378; *Dowd v. Wisconsin P. & S. R. Co.*, 65 Wis. 108, 56 Am. Rep. 620; *Rathbone et al. v. Parkersburg Gas Co.* (W. Va.), 8 S. E. 570; *Hawes v. Oakland*, 104 U. S. 450; *Bill v. Western U. Tel. Co.*, 16 Fed. 14; *Foote v. Cunard Min. Co.*, 17 Fed. 46.)

The averments as to the refusal of the corporation to bring the action constitute essential elements of the cause of action, and in the absence of allegations of such facts from the pleadings a court of equity has no jurisdiction to entertain the action. This objection is not that the plaintiffs have not the capacity to sue, and is not waived by taking issue upon the merits, but can be raised at any time upon objection that the complaint does not state a cause of action. (*Cogswell v. Bull*, 39 Cal. 320; *Dowd v. Wis. P. & S. Ry. Co.*, 65 Wis. 108, 56 Am. Rep. 620; *Hawes v. Oakland*, 104 U. S. 450; *Merchant & Planters Line v. Waganer*, 71 Ala. 582; *Greaves v. Gouge*, 69 N. Y. 154.)

The fact that the defendants, who as directors conducted the affairs of said company, were residents of the state of Missouri, could in no wise affect their standing as such directors or impair their official acts. (*McCall v. Byram Mfg. Co.*, 6 Conn.

428; *North & South Rolling Stock Co. v. People*, 147 Ill. 234; *Com. v. Detwiller*, 131 Penn. St. 614.)

In the absence of a statute, and we had not and have not now any such statute in Montana, the meetings held at St. Louis by the defendant directors were as valid as if held in the state of Montana. (Cook on Corporations, Secs. 713a, and 808; *McCall v. Byram M. Co.*, 6 Conn. 428; *Arms v. Conant*, 36 Ver. 744; *Bellows v. Todd*, 39 Ia. 209; *Missouri L. M. & S. Co. v. Reinhard*, 114 Mo. 218; *Wood Hy. Hose M. Co. v. King*, 45 Ga. 34; *Wright v. Lee*, 2 S. D. 596.)

Certainly the plaintiffs, who as stockholders participated in the acts complained of by voting their stock for the removal of the office, are thereby estopped from complaining of the result of such acts, and it is plain from the record in this case that the corporation and all of its stockholders, by acquiescing in the conduct of the affairs of the company, by the board of directors from St. Louis, and permitting without protest the directors to so carry on the business of the company, and by failing to make any objection thereto during all the years to the board of directors or other officers of the company, have precluded themselves from objecting thereto at this time. (Cook on Corporations, Sec. 730; Thompson on Corporations, Sec. 4110; *Bair v. N. Y. R. R. Co.*, 125 N. Y. 263; *McGeorge v. Big Stone Gap Imp. Co.*, 57 Fed. 262; *Hart v. Mt. Pleasant, etc. Co.*, 97 Ia. 353; *Jones v. Concord, etc. R. R. Co.*, 30 Atl. Rep. 614; *Underhill v. St. Barbara, etc. Co.*, 93 Cal. 300.)

Directors, as other agents, are not liable for honest mistakes either of law or of fact. (Thompson on Corporations, Sec. 4109, and cases cited; Cook on Corporations, Secs. 682, 702; *Hodges v. N. E. Screw Co.*, 3 R. I. 9; *Williams v. McDonald*, 37 N. J. Eq. 409.)

The rule is well settled that a corporation, no more than an individual, cannot, without knowledge, retain the fruits or benefit of a contract or transaction and still repudiate liability on its part. Even if the notes and other indebtedness were not properly authorized by the corporation in the first instance, by

receiving the money from the bank and Mr. McClure, and retaining and using the same, the company was certainly estopped from denying a proper authorization of the acts of its officers in the first instance, or a subsequent ratification. (Thompson on Corporations, Sec. 5303; Clark and Marshall on Private Corporations, Sec. 716 C, and cases cited; *Gribble v. Columbus Brewing Co.*, 100 Cal. 67; *Pittsburgh, Cin. etc. Ry. Co. v. Keokuk & Hamilton Bridge Co.*, 131 U. S. 371; *Merchants' Bank of Macon v. Central Bank*, 1 Ga. 418.)

Even though no action had ever been taken or attempted by the trustees, in fixing the salaries of the officers, those officers, under the facts in this case, would be legally entitled to every dollar they have received. (Beach on Private Corporations, Sec. 208; Morawetz on Private Corporations, Sec. 508; *Severson v. Bi-Metallic, etc. Co.*, 18 Mont. 13; *Felton v. West Iron Mt. Min. Co.*, 16 Mont. 81; *Bassett v. Fairchild*, 132 Cal. 646; *Henry v. Rutland, etc. Ry. Co.*, 27 Vt. 435.)

But the resolution of the directors at the meeting of February 25, 1893, at which four of the directors were present, and the action of the meeting of the board on April 4, 1893, at which five directors were present, the vote of the officers receiving the salaries, not being necessary to the adoption of the resolution or the action of the board at either meeting, were both valid. (Thompson on Corporations, Sec. 8585; *Clark v. American Coal Co.*, 17 L. R. A. 557; *Funsten v. Funsten Com. Co.*, 67 Mo. App. 559; *Wickersham v. Crittenden*, 110 Cal. 332.)

In the absence of any agreement or resolution there was an implied promise to pay for such services as for those of any other agent. (Thompson on Corporations, Sec. 4704 and cases cited; *Smith v. Long Island R. R. Co.*, 102 N. Y. 190; *Edwards v. Fargo, etc. Ry. Co.*, 33 N. W. 100; *Greenleaf v. Norfolk S. R. R. Co.*, 91 N. C. 33; *Missouri River R. R. Co. v. Richards*, 8 Kan. 101.)

In the absence of evidence to the contrary, due notice of corporate meetings is presumed. (*Mills v. Boyle Min. Co.*, 132 Cal. 95; *Balfour-Guthrie Co. v. Woodworth*, 124 Cal. 172;

Stockton C. H. & A. Works v. Houser, 109 Cal. 1; *Sargent v. Webster*, (Mass.) 13 Metcalf, 497.)

MR. COMMISSIONER POORMAN prepared the following statement of the case and opinion for the court:

PLEADINGS.

The original complaint in this cause was filed September 8, 1898. Subsequently several supplemental complaints and amendments were filed to meet new conditions arising, or to put in issue facts alleged to have been discovered after the commencement of the action. It is alleged that the individuals named as defendants, pretending to act as trustees (directors) of the defendant corporation, wrongfully abandoned the principal office of the company, at Butte, Montana, and moved the books, records, stock register and papers to St. Louis, Missouri; that they were proceeding to sell the stock of plaintiffs to satisfy assessments wrongfully made; and that they had misappropriated funds and other property of the company, and had been guilty of fraud in connection therewith. The court was asked to enjoin the defendants from selling the stock, to require the return of the records to Butte, and that defendants be required to render an accounting. An injunction was issued, restraining the selling of the stock, and forbidding the defendants to detain longer away from Butte the records of the company. The material allegations of the complaint were put in issue by the defendants.

APPOINTMENT OF REFEREE.

A referee was appointed by the court to hear the evidence, to make findings of fact and conclusions of law, and report the same to the court. The referee having made his report adverse to the contentions of the plaintiff, judgment of dismissal was entered; and from this judgment, and the order overruling plaintiff's motion for a new trial, this appeal is taken.

STATEMENT OF THE CASE.

The defendant company was incorporated under the laws of Montana territory, December 27, 1887, for the purpose of carrying on a general mining and milling business; to locate, acquire, sell, develop and work mines and mining claims; and to buy, sell and treat ores; these operations to be carried on at Black Pine mining district, Deer Lodge county, and also at Butte City, Silver Bow county; the business of the company to be transacted at both these places, but the principal office to be at Butte City. The capital stock of the company consisted of \$600,000, represented by 300,000 shares of stock, of the par value of \$2 each. Seven directors were to manage the affairs of the company. The mines of the company were operated until July or August, 1893, when they were closed down, and remained closed until June, 1895, when operations were resumed and continued until February, 1897, when the mines were again closed, and have not been operated since that time.

At the annual stockholders' meeting held in Butte City, Montana, June 27, 1892, the defendant directors, together with plaintiffs Williams and Joseph H. Harper, were elected directors for the ensuing year. On July 6, 1892, this new board of directors met, but, no quorum being present, adjourned to meet in St. Louis. Plaintiffs Williams and J. H. Harper were present and supported this action. In the published notice of this stockholders' meeting was contained a statement that at such meeting the question of removing the office to St. Louis would be submitted, and the following resolution was introduced: "Resolved, that the home office and directory of the the Combination Mining & Milling Company be removed from the city of Butte, in the state of Montana, to the city of St. Louis, in the state of Missouri, and that the incoming president and board of trustees (directors) be and the seven are hereby authorized and empowered to perform any needful and lawful acts whatsoever necessary or required for the purpose of such removal." 261,429 shares of stock were voted in favor of this

resolution, and 1,600 shares against it. Plaintiffs Williams, J. H. Harper and Helen C. Harper supported this resolution. The records of the company from this time until the return of the office to Butte, in October, 1898, appear to be in a somewhat chaotic condition. The treasurer, it appears, kept no record at all. The secretary's record is in part regular in form, and in part consists of fragmentary scraps and separate sheets of paper written in pencil, containing blanks and marginal notations pinned to the leaves of some book, or laid loosely between the leaves. Certain writings purporting to be by-laws of the company were also presented. Some of these records consist of references to resolutions or proceedings by number, without containing the resolutions or proceedings to which they refer. These matters were all offered in evidence, and were, except the loose sheets, admitted, for one purpose or another, over the objections of plaintiffs.

Passing these objections for the time being, and considering these so-called records in connection with the oral testimony in the cause, it appears that Charles D. McClure was president, Paul A. Fusz vice president, M. Rumsey treasurer, and Jesse B. Mellor secretary of the board of directors; that at the meeting of this board held at St. Louis, December 29, 1892, at which were present defendants Ewing, Fusz, M. Rumsey, L. M. Rumsey and President McClure, this proceeding was had: "That this board does hereby approve the following salaries and office rent, as set by the president: Secretary's salary \$1,250 per annum, messenger's salary \$300 per annum, office rent \$200 per annum." That on February 25, 1893, this board held an adjourned meeting at St. Louis, at which were present Vice President Fusz, L. M. Rumsey, Treasurer M. Rumsey and President McClure, and the following proceeding was had: "Mr. Fusz offered, Mr. L. M. Rumsey seconding, that the president be paid a salary of \$2,500 per annum; that the vice president be paid a salary of \$5.00 per day for each day actually served; that the treasurer be paid a salary of \$25 per month, all to date from January 1, 1893. Adopted." It further ap-

pears that these defendants, acting as such board of directors, continued to hold meetings at St. Louis, Missouri, until, in obedience to the order of the court, they returned the records to Montana; and at Butte, Montana, October 27, 1898, a directors' meeting was held, at which were present Ewing, Fusz, Rumsey, Williams and one Merrill, who was then a director; absent, McClure and M. Rumsey. At this meeting the minutes of the meeting of November 21, 1891, and July 16, 1892, were also read and approved by all the trustees present, except Williams, who did not vote. The minutes of the various directors' meetings which had theretofore been held in the city of St. Louis were then read and approved by all of the directors present, except Williams, who did not vote. It appears further that during the time the office was maintained at St. Louis the stockholders' meetings were held at Combination, Montana; these defendants, except Mellor, being uniformly re-elected as directors. The defendant Mellor was at no time a director, but was during this period, in addition to being the secretary of the board of directors, also the private secretary of defendant McClure.

The expenditures and charges to which specific objections are made are:

Pres. McClure, salary as president.....	\$14,374 78
Pres. McClure, expenses attending stockholders' meeting.....	75 00
Pres. McClure, attorney's fee.....	500 00
Vice Pres. Fusz, salary as acting president.....	1,038 15
Vice Pres. Fusz, attorney's fee.....	400 00
Vice Pres. Fusz, visiting directors in Montana in May, 1896.....	73 20
Treas. Rumsey, salary as treasurer and acting president.....	2,010 28
A. W. Ewing.....	50 00
Jesse B. Mellor, salary as secretary.....	7,760 01
Office boys at St. Louis.....	1,089 85
Telephone	595 20
Office, office supplies, subscription to newspapers, in St. Louis....	2,147 94
Louis S. McClure, as attorney's fee.....	700 00
Bi-metallic M. Co., a corp., attorney's fee, in March, 1893.....	562 55
Also an entry as "Inexplainable shortages" from 1896 to 1897.....	5,076 00
Also an entry in favor of Paul A. Fusz, C. T. Rhodes, Boyd Bros. and W. J. Schofield, for expenses of this suit.....	1,056 65
Demand note dated Dec. 23, 1896, to the National Bank of Com- merce in St. Louis, with interest at 6 per cent. per annum from date	10,000 00

This note is signed "Combination Mining & Milling Co. Chas.
D. McClure, Pres." There was also a deposit of 25,418 ounces

of silver bullion, having a value of \$16,000, made to secure the payment of this note.

Demand note dated March 4, 1897, to the National Bank of Commerce in St. Louis, interest at 6 per cent. per annum from date.. 10,000 00

This note is signed, "Combination Mining & Milling Co., by M. Rumsey, Acting President." A deposit of 32,172 ounces of silver bullion, then having a value of some over \$20,000, was made as security for the payment of this note.

Demand note dated March, 1899, to State National Bank of St. Louis, interest at 5 per cent. per annum..... 3,500 00

This note is signed, "Combination Mining & M. Co., by M. Rumsey, Acting President."

"Promissory note or writing obligatory," dated June 18, 1898, to State Bank of St. Louis, due six months after date, with interest at 8 per cent. per annum from maturity..... 18,000 00

This instrument is signed, "Combination M. & M. Co., Chas. D. McClure, President."

Amount collected on assessment of June 18, 1898..... 10,605 95

Amount claimed to have been loaned and advanced to company by Pres. McClure 9,583 30

Maintaining office at Butte since return in October, 1898, at \$180 per month

Disposition of the proceeds derived from the sale of the silver bullion deposited as security..... ..

OPINION.

1. It is claimed by respondents that it does not appear that plaintiffs had first exhausted their remedy within the corporation, and cannot maintain this suit. The plaintiffs make no complaint against the corporation as such, or against the other stockholders thereof, but seek relief against the individual trustees and officeholders, who, it is alleged, have been and are now fraudulently diverting and misappropriating the funds of the corporation, and were attempting to sell the stock of plaintiffs to satisfy an illegal assessment levied by the same individual defendants. The corporation is necessarily made a party to the action. Though in the name of the plaintiffs, the action is in reality on behalf of the corporation. (*Beach v. Cooper*, 72 Cal. 99, 13 Pac. 161.)

The action being directed against the trustees and office holders, it would be idle to require the plaintiffs to first make the demand against those officials that they bring suit against themselves; and it further appears that one of the purposes for which the suit was brought was to restrain the sale of stock under an assessment levied in St. Louis in June, 1898; that this

stock would become delinquent August 5th of the same year, and would be sold on the 10th of the following September, a period of little over thirty days intervening between the alleged levy of the assessment and the time when the same would become delinquent. If it were possible in that limited time for plaintiffs to counsel with all the other stockholders or call a stockholders' meeting to consider the same, such action would be unnecessary, for the reason that, had all the other stockholders refused to interfere with the assessment, any stockholder owning a single share of stock would have the right to bring the action in his own name to prevent his own property from being sacrificed to satisfy an illegal assessment. If the allegations of the complaint are not sufficient to entitle the action to be considered as brought on behalf of others than the plaintiffs, its sufficiency as an action in their own behalf is not impaired by the averments that they bring it for others as well as for themselves. (*Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788.)

In *Forrester et al. v. Boston & Montana C. C. & S. Mining Co.*, 21 Mont. 544, 55 Pac. 229, 353, the court says: "The law, which does not demand a request that a person or corporation sue him or itself, nor require the doing of any useless thing, as prerequisite to the accrual of a right of action, will, therefore, in the circumstances here existing, permit the plaintiffs to maintain suit to undo or prevent the acts of directors or stockholders, performed or threatened to be performed, if such acts be, as to plaintiffs, *ultra vires*. (*Gerry v. Bismarck Bank*, 19 Mont. 199, 47 Pac. 810; *Miner v. Ice Co.*, 93 Mich. 112, 53 N. W. 218, 17 L. R. A. 412; *Forrester et al. v. Boston & Montana Cons. C. & S. M. Co.*, 29 Mont. 397, 74 Pac. 1093; *Brewer v. Boston Theater*, 104 Mass. 378.)

A court of equity having obtained jurisdiction for one purpose, may retain that jurisdiction for all purposes of the action necessary to the complete protection of plaintiff's rights. (*Eaton on Equity*, p. 39; 2 Pomeroy, Eq. Juris. par. 181; *Ober v. Gallagher*, 93 U. S. 199, 23 L. Ed. 829; *Montana Ore Pur. Co. v. Boston & Montana Cons. C. & S. M. Co.*, 27 Mont. 288, 70 Pac. 1114.)

2. The method pursued by the defendant directors and officers in the conduct of the company's business appears to have been to leave the matter almost wholly with the president and the secretary. The president had the custody and control of the money and funds of the company, and had the authority to pay the same out on vouchers approved by the president and attested by the secretary, by checks signed by the treasurer and the president. The signing of these checks seems to have been about the only function performed by the treasurer. The board of directors did not appear to have figured in the allowance or payment of accounts, nor is there anything in the record to the effect that the board of directors had ever ordered paid any accounts. The treasurer, it appears, kept no books at all. The statements which he rendered would therefore be collated from the books kept by the secretary and the president. The president and the secretary were therefore charged with the knowledge of all the expenditures made, to whom they were made, and for what purpose. The evidence of those two officials relative to the expenditures charged in the complaint as having been a misapplication of the funds of the company is very meager. The president says he did not know what the \$75 was paid him for; it may have been for traveling expenses or board. The secretary attempts no explanation. The president further says that he cannot tell what the \$500 paid him as attorney fee was for, except that it was in relation to salt contracts. The secretary's meager statements are to the same effect. The \$400 paid as attorney's fee to defendant Fusz is not explained by the president, but the secretary and Fusz say it was in connection with traveling expenses to Utah to investigate a process for working silver. No explanation whatever is made of the \$73.70 paid to Fusz, as stated on the books, for visiting directors in 1896. The \$50 paid Ewing, it is claimed, was for auditing books. The \$1,089.85 was for expense of office boys at St. Louis from 1892 to 1898. The \$595.20 charged for telephone was used for that purpose at St. Louis during this period. The \$2,147.94 charged for office supplies, subscriptions to news-

papers, etc., was for rent, stationery and books in St. Louis. The \$700 paid to Louis S. McClure as attorney fee was simply paid him by the president, Charles D. McClure, to be used in the "silver cause," though how it was used, and when, or whether at all, the record is silent. The attorney's fee paid the Bimetallic Company, of \$562.55, was to assist in paying expenses of a delegation sent to Helena to work for the creation of Granite county. No explanation is attempted of the \$5,076 entered as "inexplainable shortages." The \$1,056.55 charged in favor of Fusz, Rhodes, Boyd Bros. and Schofield, for the expenses of this suit, are alleged to be expenses incurred by Fusz and Mellor in preparing for the defense of this action. The money received on the two \$10,000 notes executed to the Bank of Commerce, St. Louis, it is claimed, was sent to Montana to be used for the benefit of the company. The \$3,500 note to the State National Bank of St. Louis, it is claimed, was used for paying the salary of Rhodes and Coy, and for purchasing goods. Rhodes was assistant secretary.

It is claimed that the proceeds of the \$18,000 note executed to the State Bank of St. Louis were used in taking up the other two \$10,000 notes.

It appears further that \$10,605.95 was collected on the void assessment of June 18, 1898, and was paid to the president; that the \$9,515.41 claimed to have been loaned to the company by the president was for the purpose of refunding to the stockholders the amount paid in on this void assessment. The president says this amount paid in on this void assessment was used by the company, and he says: "I advanced the amount to the company, and the money was used for care-taking, insurance, taxes, and other necessary running expenses, and interest." He also adds that no salaries were paid out of the above funds to officers. Whether the president has reference to the money loaned by him to the company, or to the \$10,605.95 when he says it was used by the company for insurance, taxes, running expenses, etc., and that no part was paid for salaries, cannot be gathered from his general answer. The secretary, Mellor,

in testifying relative to expenditures of the amount paid in on this void assessment, says "that \$5,400 of it was retained by the president." Then he corrected that statement, and said the amount retained by the president was \$6,364.92. On redirect examination he states that this amount retained by the president was \$5,074.79; also that a check was drawn in favor of M. Rumsey for \$675; that a check was also drawn in favor of A. W. Ewing for \$50; that another check was drawn in favor of Mr. Fusz for \$487.50. None of these checks had been paid. The only explanation of the \$180 per month charged for maintaining the office in Butte is that "it is necessary expense." The record shows that \$35 of this was for rent. What the other was for is not explained. The testimony further shows that \$250 per year is the reasonable expense of maintaining the company's office at Butte, and doing the necessary bookkeeping, and that \$5,000 per year was ample to protect the company's property and to pay the insurance and taxes.

On the....day of...., 1900, the National Bank of St. Louis brought suit in the United States circuit court for the district of Montana against the defendant company, and recovered judgment by default against said company for the amount of the \$3,500 note, and also for the amount of the \$18,000 note, which had been assigned to the plaintiff; the amount of said judgment being \$29,903.06. Execution was issued, and the personal property of the defendant company sold to the Bi-metallic Mining Company, a corporation operated by defendants, for \$800, and the real estate was sold to the plaintiff in that action for \$29,075. Defendant Chas. D. McClure also obtained a default judgment against the defendant company for \$9,583.30, for the money alleged to have been loaned by him to repay the void assessment, and for \$67.89 paid out on account of the company. Sale of this property under execution was made on May 11, 1900. In the statement made by Treasurer M. Rumsey, on January 6, 1898, the personal property belonging to the company is listed, with a value thereof, and amounts to several thousand dollars. One diamond drill alone

is listed at \$3,247.60. The return of the United States marshal does not specify the items of personal property sold. The defendant corporation was not operating its mines during any of this period, and the record does not contain any explanation of this enormous decrease in the value of its personal property. When the company closed its operations in 1893, the reasons for such action given was the low price of silver. In 1895, when operations were resumed, it is shown that silver was still lower than when the company closed in 1893, but the defendant alleged that it was for the purpose of working off supplies then on hand; yet it appears that in February, 1897, when operations were finally closed, the company had on hand more than \$20,000 of supplies, and it is not in the record that any disposition was ever made of them.

The record does not contain any specific authority from the board of trustees to any of the officials to negotiate these loans or to execute these notes; neither does the entry of any of these charges in the books of themselves, in the form there appearing in the light of this evidence, show that the expenditures were for legitimate corporate purposes, the plaintiffs having shown that neither of the parties to whom an attorney's fee was credited was in fact an attorney. Under the rule which the officials claimed was their guide, the president and secretary were to be given vouchers for these several expenditures, but at this hearing these vouchers were either not produced, or, if produced, they contained no information as to what the items were expended for. It is claimed by defendants that the word "attorney" should be read "agent." The donation to Louis S. McClure and to the Bimetallic Mining Company were clearly outside of the purposes for which the corporation was created, both being for strictly political purposes. The statute specifies the purposes for which corporations may be created. Political purposes do not appear in the enumeration. The stockholders of the company, for aught the record here shows, were not unanimous in their political beliefs, or in the desire to have this new county created. It is also possible that a majority of the stock-

holders may have sanctioned all these actions of these directors and of these officials in such a manner as to be binding upon them, but, if so, it is on the ground of estoppel, and is not binding upon those stockholders who did not take part in these proceedings, or sanction, by act or acquiescence, the making of these expenditures. (Cook on Corp. par. 657.) It further appears that the deposit of 57,590 ounces of silver made as security for the payment of the two \$10,000 notes was withdrawn and sold, but there is no evidence as to what became of the proceeds.

3. On February 25, 1893, four of the defendant directors assembled at St. Louis, and, on motion of Vice President Fusz, voted three of their number, to-wit, President Charles D. McClure, Vice President Paul A. Fusz and Treasurer M. Rumsey, the salaries before mentioned. This resolution not only fixed the salaries of these officials, but gave them back pay from the 1st day of January, 1893. Officers of a corporation are not, as of right, entitled to salaries. Neither has the board of directors the inherent power to vote a salary to any director. The power so to do must emanate from the stockholders, from statute or from by-laws legally adopted.

In *Blue v. Capital National Bank*, 145 Ind. 518, 43 N. E. 655, the court, at page 521, 145 Ind., and page 656, 43 N. E., says: "In Thompson, Com. on the Law of Corp. Vol. IV, Sec. 4682, the rule with reference to the question presented by this plea is stated thus: 'The president of a corporation is always a member of its board of directors. In addition to his ordinary duties as a director, it is his function to preside at meetings of the board, and, together with the secretary, and by means of the corporate seal, where a seal is required, to authenticate the formal acts and contracts of the corporation. In respect of his right to compensation, he is subject ordinarily to the rule already stated with regard to directors: he is not entitled to any compensation for performing the ordinary duties of his office, unless the governing statute, or some by-law, regulation, resolution or contract, to which his own vote was not essential, has given it to him. As the law does not imply an agreement to pay

for such services, in order for him to recover compensation for them he must at least show an antecedent, valid agreement to pay for them.' That the proposition stated in the text is correct, we have no doubt; that it is well fortified by the decisions, we know; and that the same rule applies to the office of vice president, it is needless to suggest. * * * Section 4380, Thompson, Com. Corp.; *Loan Ass'n v. Stonemetz*, 29 Pa. St. 534; *Cheaney v. Lafayette, etc. Co.*, 68 Ill. 570, 18 Am. Rep. 584; *New York, etc. Co. v. Ketchum*, 27 Conn. 170; * * * *Kilpatrick v. Penrose Bridge Co.*, 49 Pa. St. 118, 88 Am. Dec. 497; * * * *Hall v. Railroad Co.*, 28 Vt. 401, 406; *Bliss v. Matteson*, 45 N. Y. 22; * * * *Maux Ferry, etc. Co. v. Branegan*, 40 Ind. 361."

In *Pfeiffer v. Lansberg Brake Co.*, 44 Mo. App. 59, the court holds that one who is both a secretary and a director of a corporation is not entitled to compensation for services as secretary in absence of specific prearrangement therefor. On page 62 the court says: "The cases hold with great unanimity that the directors of a corporation are not entitled to compensation for their services as directors, unless by statute, by-law or prior action of the stockholders; that the law does not imply a promise on the part of the corporation to pay for such services; and that they cannot vote themselves compensation for such services after the services have been rendered." Citing a number of cases, among which appear *Eakins v. White Bronze Co.*, 75 Mich. 568, 42 N. W. 982; *Ashton v. Dashaway Ass'n*, 84 Cal. 61, 22 Pac. 660, 23 Pac. 1091, 7 L. R. A. 809; *Wood v. Lost Lake, etc. Co.*, 23 Ore. 20, 23 Pac. 848, 37 Am. St. Rep. 651.

In *McMullen v. Ritchie*, (C. C.) 64 Fed. 253, the court holds that, in the absence of resolution or by-law, an officer of a corporation cannot predicate a claim against the company for services rendered as such officer. See, also, *Danville, H. & W. R. Co. v. Kase*, (Pa.) 39 Atl. 301; *McCarthy v. Mt. Tecarte L. & W. Co.*, 111 Cal. 328, 43 Pac. 956.

Defendants claimed that the board possessed this power under authority conferred by certain provisions of what they claim

are the by-laws of the corporation, and which were put in evidence by the defendants. Section 454 of the Fifth Division of the Compiled Statutes of 1887 conferred upon the directors of a corporation the authority to make by-laws. Whether the by-laws introduced in evidence in this case were ever legally adopted, so as to make them binding upon the stockholders or the corporation, will be hereafter considered. They are at least in this action binding upon the defendants. It appears to be a fact admitted that the five defendant trustees held a meeting in St. Louis, Missouri, December 1, 1892, and adopted this code of so-called by-laws, conferring upon themselves the authority to vote salaries, and then, under the authority thus conferred, proceeded afterwards to vote three of their number the salaries complained of. This action of the officials in voting themselves salaries cannot be sustained, and the resolution must be declared wholly void. (Section 2970 *et seq.*, Civil Code.)

In *Wickersham v. Crittenden*, 106 Cal. 327, 39 Pac. 602, the court holds that a salary, whether a fair one or not, voted by the trustees of a bank to one of their number as president, is unlawful, and he may be compelled to account therefor, where he took part in the proceedings, and his vote was essential to the adoption of the resolution.

Martin v. Santa Cruz Water Storage Co., (Ariz.) 36 Pac. 36, was an action by a secretary of a corporation to recover his salary. It appears that the by-laws adopted by the corporation authorized the board of directors to appoint a secretary and fix his salary. The board consisted of five directors. Three of these directors met, and voted one of their number a salary as secretary. The supreme court, in affirming the judgment in favor of the defendant rendered in the district court, uses the following language: "The appellant was a director of the corporation, and intrusted with its interest in a fiduciary capacity. He owed to his principal his fair, impartial and disinterested judgment in fixing the salary of its secretary. The corporation had the right to demand of him his entire vigilance in its behalf. It is intolerable that an agent be suffered to act at the same

time, in the same matter, for himself and principal too. The result of such a course, if allowed, would be manifest. The act of a fiduciary agent in dealing with the subject-matter of his trust, or the interest intrusted to his care and keeping, to his own individual gain and profit, is viewed by the courts with great jealousy, and will be set aside on slight grounds. The doctrine is founded on the soundest morality, and is frequently recognized. *Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328. All transactions so tainted are voidable, without regard to the fairness or honesty of the act. *Graves v. Mining Co.*, 81 Cal. 303, 22 Pac. 665. And so a director of a corporation cannot vote himself a salary. *Ward v. Davidson*, 89 Mo. 445, 1 S. W. 846; *Butts v. Wood*, 37 N. Y. 317. The rule is enforced with great rigor against officers voting themselves salaries. *Thomp. Liab. Off.* 351. They cannot properly act on, nor form part of a quorum to act on, a proposition to increase their compensation. *Bank v. Collins*, 7 Ala. 95. Certainly they cannot vote themselves 'back pay.' It is like giving away the assets of the corporation. *Cook, Stocks & S. Sec.* 657, p. 756; *Holder v. Railroad Co.*, 71 Ill. 106, 22 Am. Rep. 89." See, also, *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788; *Hardee v. Sunset Oil Co.* (C. C.) 56 Fed. 51.

In *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854, the court, in considering the legality of the act of four directors of a corporation in voting three of their number salaries, says: "They are agents of the corporation, and, as in cases of other agents, their acts on behalf of their principal, in matters where their own interests come in conflict with those of the corporation—where their self-interest may tend to deprive the corporation of the full, free and impartial exercise of the judgment and discretion which they owe to their principal—are looked upon and scrutinized with great jealousy by the courts. Their acts in such cases are *prima facie* voidable at the election of the corporation or of a stockholder. *Cumberland Coal, etc. Co. v. Parish*, 42 Md. 598; *Coleman v. Second Ave. R. Co.*, 38 N. Y. 201; *Hoyle v. Plattsburgh & M. R. Co.*, 54 N. Y. 314, 13 Am. Rep.

595; *Blake v. Buffalo Creek R. Co.*, 56 N. Y. 485; *Covington, etc. R. Co. v. Bowler*, 9 Bush. 468; *Paine v. Lake Erie, etc. R. Co.*, 31 Ind. 283; *Port v. Russell*, 36 Ind. 60, 10 Am. Rep. 5; *Cook v. Berlin Woolen Mill Co.*, 43 Wis. 433; *European, etc. Ry. Co. v. Poor*, 59 Me. 277; *Bestor v. Wathen*, 60 Ill. 138; *Harts v. Brown*, 77 Ill. 226; *Simons v. Vulcan Oil, etc. Co.*, 61 Pa. St. 202, 100 Am. Dec. 628; *Rice's Appeal*, 79 Pa. St. 168; *First Nat'l Bank v. Gifford*, 47 Iowa, 575; *Gardner v. Butler*, 30 N. J. Eq. 702. The rule is applied rigorously to votes giving themselves compensation. Thompson on Officers of Corporations, 351, and note; *Maux Ferry Gravel R. Co. v. Branegan*, 40 Ind. 361." To the same effect are the decisions in *Miner v. Ice Co.*, 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412; *Ten Eyck v. Pontiac, etc. R. Co.*, (Mich.) 3 L. R. A. 378, note; *Ward v. Davidson*, 89 Mo. 445, 1 S. W. 846; *Hill v. Rich Hill C. M. Co.*, 119 Mo. 9, 24 S. W. 223; Cook, Corp. (5th Ed.) 657; 10 Cyc. of Law Proc. 899.

4. It is claimed that it was advantageous to the company to have its office at St. Louis; that it could purchase its supplies with two other companies operated by defendants; could get a lower rate of interest; and that St. Louis was a good silver stock market. Why all this could not have been accomplished through an office in Montana is not apparent. The record shows that the principal supplies required by the company were quicksilver, powder, salt, mining machinery and mining supplies; that all these were purchased in California, Utah, Montana and at Chicago; and that the product of the mines was silver bullion, which was marketed in New York. There is some evidence to the effect that defendant L. M. Rumsey sold some supplies to the company on competitive bids, but neither the character nor the amount of these supplies is stated. It is not explained what advantage the company received from a telephone service at St. Louis, or from the employment of office boys there, when all the actual mining operations were carried on in Montana; Neither does it appear that this company received any benefit whatsoever by reason of maintaining the office at St. Louis that

would not have accrued to it, had the office been kept at the place designated in the articles of incorporation. Neither can the charge of \$1,056.65 made by defendants Fusz and Mellor against the defendant corporation as cost incurred by them in preparing their defense in this action be sustained.

5. The law under which this company was incorporated is Chapter 25, Fifth Division, Comp. St. 1887. That statute provided that the certificate filed with the secretary of the territory should designate the city, town or locality and county in which the principal business of the company should be transacted. Section 449. That section also provided that the company might designate a place of business outside of the territory, but the certificate should so state.

Sections 468 and 486 of the same division provided the manner in which a company organized under that chapter, or prior to the enactment of that law, might come under, and avail itself of, the privileges and provisions in said chapter granted.

This company, it will be noticed, did not follow this procedure in the removal of its office to St. Louis. That statute undoubtedly means that the company, while maintaining its principal office within the state, may designate a subordinate office outside of the state; but there is no law any place which authorizes the removal of the principal office from the jurisdiction in which the company was created. The resolution passed at the stockholders' meeting in June, 1892, provides for the removal of the home office and directory of the company from the city of Butte to the city of St. Louis. The testimony is that this office was actually moved to St. Louis, and that the books, papers and records of the company were taken to St. Louis, and that the office at Butte, designated in the articles of incorporation as the principal office of the company, was actually closed and abandoned. By reason of this action the records of the company were removed beyond the jurisdiction of the state in which the corporation was created, and where it actually transacted its mining business. The funds of the company were also removed. The record of the actions of the board of directors was kept at

St. Louis. Expenditures were made from there. The stock books were kept there—all beyond the reach and jurisdiction of the state of Montana. Local stockholders had no means of ascertaining just what was done by the board of directors, except by journeying to St. Louis. These acts were without warrant or sanction of law, and must therefore be held *ultra vires*, and not binding on any one who did not participate therein.

It is true that corporations organized in one state may transact business in a foreign state. It is likewise true that persons who deal with corporations in such foreign state may be estopped from disputing the validity of the transactions. But we know of no principle of law that authorizes a corporation to move its principal business office from and beyond the jurisdiction of the state in which the corporation was created.

In *MacGinniss v. B. & M. Cons. C. & S. M. Co.*, 29 Mont. 428, 75 Pac. 89, this court uses this language: "The officers of a corporation are trustees. By their acts in engaging in an unlawful enterprise, and making the corporation a party to it, they are guilty of a breach of trust, and both they and the corporation can be held to account by a court of equity, at the suit of a minority stockholder who has not participated in the violation of the law."

It is also true that directors of a corporation may transact much business outside of the state, but they have no right to move the entire official business of the corporation beyond the state, and the acts of these directors in attempting to hold regular monthly meetings and to sit as the board of directors of the corporation at St. Louis, Missouri, were acts *ultra vires*.

6. It is also claimed by the defendants that these various acts of the board of directors were subsequently ratified by the board at a regular meeting held in Butte, Montana, October 27, 1898, and at the various stockholders' meetings held at Combination, Montana, during the time that the directors were maintaining the office in St. Louis. The action of defendants in meeting at Butte after the commencement of this action, and attempting by their own votes to ratify their own previous ac-

tions, of which complaint is here made, can have no significance in this case. At each of the various meetings held in Combination, Montana, during the time that the trustees were maintaining the principal office in St. Louis, Missouri, the following resolution was passed: "Resolved, that all the acts of the trustees and officers of this company in conducting its business for the year last past and now closed, be and the same is hereby approved." It appears, however, that none of the matters complained of in this suit were presented to the stockholders. The only purpose for which these meetings were called, as stated in the notice, was to elect directors. No other business was specified. No statements were presented as to the conditions of the company or as to what business had been transacted by the directors. These meetings were attended in person by only a few of the stockholders, though proxies for a majority of the stock were present. The defendants and their friends held a majority of this stock. The resolution appears to be the same in substance as that quoted in *Farmers' Loan & Trust Co. v. San Diego St. Car Co.*, (C. C.) 45 Fed. 518, which in that case was held insufficient as a ratification. As stated in *Martin v. Santa Cruz Water Storage Company*, above cited: "The act claimed as a ratification is not a direct, substantive act, with that object in view." We have, as a result, should we treat this action as a ratification, some of these very defendants who voted for this resolution, and who, we are justified in saying from this record, caused its adoption, indorsing and ratifying their own wrongful acts, which cannot be permitted.

It is further claimed that the plaintiffs have been guilty of laches. There might be some force in this contention if the complaint here made only went to a single act, but the same course of conduct was pursued up to the very commencement of this proceeding. There is no room here for any claim that either the corporation or the minority stockholders have acquiesced in or ratified this conduct. (*Miner v. Ice Co.*, 93 Mich. 112, 53 N. W. 218, 17 L. R. A. 412.)

7. Certain matters were admitted in evidence, over the ob-

jections of the plaintiffs, the competency of which has not heretofore been passed upon. The record of the stockholders' meetings held in Montana during the time that the office was kept at St. Louis, and certain parts of the so-called by-laws, were admitted over the objection that they had never been legally adopted. Objection was also made to certain parts of the depositions of witnesses McClure and Fusz. All this evidence was considered by the referee and court at the trial, and has been herein treated as forming a part of this record, but the objections have not been passed upon. The minutes of the stockholders' meetings consisted of separate sheets of paper pinned to the leaves of a record book, and this was their only identification. This was insufficient. These minutes should have been rejected as not properly identified. In the matter of the introduction of the by-laws, the plaintiffs had first introduced a part thereof with a reservation that they did not admit their legality, but at the same time maintained that they were not legally adopted. These by-laws introduced by plaintiffs, as well as those introduced by defendants, were all recorded in the same book, and, the plaintiffs having introduced a part of the by-laws over the objections of defendants, the defendants had the right to introduce the remaining part. (Section 3130, Code of Civil Procedure.)

The objections made to the depositions of the witnesses McClure and Fusz were principally to the effect that their answers to some of the questions were not responsive, were indefinite and evasive, or were conclusions of the witnesses. It must be admitted that a part of the testimony of these witnesses is not of that certain and positive character which a *cestui que trust* has a right to expect and demand from his trustee, but we find no reversible error in its admission in this particular action.

8. It appears affirmatively from the record that no part of the money paid to or withheld by the defendants as salaries was on account of any services performed by them in or about the operation of the company's mines. On the contrary, it appears that no such services were performed by defendants, and that

a sum exceeding \$13,000 was paid as salaries while the mines were lying idle. Defendant Mellor says he never resided in Montana. His services as secretary, for which he was paid more than \$7,000, were confined to St. Louis. The necessity for negotiating these loans at St. Louis, for the repayment of which the company's property was sold on execution, was caused, if such necessity did in fact exist, by the wrongful act of the defendant directors in voting the salaries to the president, vice president and treasurer, and to their secretary stationed at St. Louis. These acts of the directors are made fraudulent by the provisions of Civil Code, Section 2976. (*Miner v. Ice Co., supra.*) Defendant Mellor was, however, at no time a director, nor does the record connect him with any fraudulent transaction. The officials, however, who caused this money to be paid to him, may be required to account therefor.

We recommend that the judgment and order be reversed, and that the cause be remanded to the district court for further proceedings.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order are reversed, and the cause is remanded, with directions to the district court to set aside its findings and to proceed in accordance with the views therein expressed.

Rehearing granted July 8, 1904.

HENNESSY, RESPONDENT, v. KENNEDY FURNITURE
COMPANY, APPELLANT.

(No. 1,850.)

(Submitted March 28, 1904. Decided April 18, 1904.)

*Evidence—Receipts—Parol Explanation — Appeal—Findings
of Fact—Review.*

1. In an action on an assigned demand there was admitted in evidence on behalf of plaintiff a so-called "duplicate" written assignment, but on appeal by defendant it did not appear from the record whether the original or duplicate assignment was delivered to plaintiff by the assignor, or whether the paper admitted in evidence was merely a copy of the original. *Held*, that it was not shown that error was committed, even if the original or duplicate should have been produced instead of a copy.
2. Plaintiff claimed that she deposited with defendant money to be applied on the price of furniture, on an understanding that, if the sale should not be consummated, the money should be returned, and defendant claimed there was a sale and part payment. *Held*, that it was proper to admit testimony on behalf of plaintiff to explain the purpose and meaning of a receipt given by defendant to plaintiff.
3. Findings of the trial court, based on conflicting evidence, will not be disturbed on appeal.

Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

ACTION by D. J. Hennessy against the Kennedy Furniture Company. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, defendant appeals. Affirmed.

Messrs. Pemberton & Maury, for Appellant.

Mr. Miles J. Cavanaugh, for Respondent.

MR. COMMISSIONER CALLAWAY prepared the following opinion for the court.

Appeal from a judgment in favor of plaintiff and from an order denying defendant's motion for a new trial.

It appears from the complaint that one Mrs. Gwin, on or about September 5, 1900, deposited with the defendant the sum of \$500, to be applied on the purchase price of certain furniture, with the agreement that if, for any cause, the sale should not be consummated, the money should be returned to her; that the sale "fell through," whereupon she demanded the return of the money, which was refused; that she assigned the claim to plaintiff; and that nothing of value was ever received from the defendant by either plaintiff or his assignor, Mrs. Gwin.

The answer denied the making of the assignment to plaintiff, and alleged that the defendant agreed to sell and deliver to Mrs. Gwin furniture of the value of \$4,215, which she agreed to receive, and that the \$500 was a partial payment on the purchase price. Other allegations in the pleadings need not be stated.

The case came on for trial before the court sitting without a jury. At the outset of the trial it was admitted that before the commencement of the action the defendant had notice of the assignment of the claim to plaintiff, and that a demand had been made for the payment of the \$500. Mrs. Gwin testified that she had assigned her claim against the defendant to plaintiff. The court admitted in evidence, over the objection of defendant, a so-called "duplicate" written assignment, whereby Mrs. Gwin transferred the claim to plaintiff. It is not clear from the record whether the original or duplicate assignment was delivered to plaintiff by Mrs. Gwin, or whether the so-called duplicate admitted in evidence was merely a copy of the original. Hence it is not apparent that error was committed, even if it be conceded that the original or duplicate should have been produced instead of a copy.

When Mrs. Gwin deposited the money with defendant she was given a receipt for it, and the defendant now claims that she and her assignee are bound by its terms. Considerable testimony was adduced on the part of plaintiff, without objection on the part of defendant, to explain how the receipt came to be given, and what it was intended for. We are of the opinion that from the facts apparent in the record this testimony was clearly competent. As said by this court in the case of *Ramsdell v. Clark*, 20 Mont. 103, 49 Pac. 591: "Whether a receipt possesses any contractual feature or not must often be determined from its entire language, and also, at times, from the language in connection with the circumstances under which it was given."

The lower court found, in effect, that the receipt was not evidence of a contract between the parties, but was simply intended as an acknowledgment of money deposited with defendant by

Mrs. Gwin. The testimony was conflicting, and the court found for plaintiff. Its findings of fact based upon such testimony will not be disturbed. (*Nelson v. Great Northern Ry.*, 28 Mont. 297, 72 Pac. 642.)

The judgment and order should be affirmed.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

LANDEAU, RESPONDENT, v. FRAZIER ET AL., APPELLANTS.

(No. 1,830.)

(Submitted March 22, 1904. Decided April 18, 1904.)

New Trial—Surprise—Newly Discovered Evidence—Insufficiency of Evidence—Discretion of Court—Appeal.

1. The granting or refusing of a new trial upon the ground of surprise or newly discovered evidence rests largely in the discretion of the trial court, and its ruling will not be disturbed in the absence of an abuse of such discretion.
2. Where there is evidence to sustain the findings of the trial court, and the evidence is conflicting, the findings and decision will not be disturbed on appeal.

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

ACTION by Sarah Francis Landeau against Gus Frazier and Minnie Frazier. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

Messrs. Downing & Stephenson, for Appellants.

Mr. J. A. Largent, and Mr. J. A. McDonough, for Respondent.

MR. COMMISSIONER CALLAWAY prepared the following opinion for the court:

Plaintiff brought this action to have the defendant Gus Frazier declared her trustee of the east half of lot 2 in block 137 of the townsite of Great Falls, together with the buildings and appurtenances thereunto belonging; praying that said defendants, Gus and Minnie Frazier, be ordered by the court to execute and deliver to the plaintiff a good and sufficient warranty deed conveying to her such property, and that the defendant Gus Frazier be required to account to the plaintiff for certain rents and profits which he had received from the property.

The case was tried to a jury, which returned special findings. Thereupon the court made up its findings, adopted some found by the jury, and, rejecting others, entered its judgment and decree declaring plaintiff entitled to a conveyance from the defendants for such property, and ordered that the defendant Gus Frazier pay to the plaintiff the sum of \$460, rent collected by him, together with the costs of the action. The defendants moved for a new trial, which was denied. From the judgment and order denying their motion for a new trial, they have appealed.

Defendants' grounds for new trial were surprise which ordinary prudence could not have guarded against; newly discovered evidence, material to the defendants, which they could not, with reasonable diligence, have discovered and produced at the trial; insufficiency of the evidence to justify the findings and decisions of the court. In support of the first two grounds recited, defendants filed a number of affidavits. These were controverted by the plaintiff.

Assuming that the affidavits are properly in the record, we have examined them, and find that the newly discovered evidence offered by the defendants is either immaterial, under the issues framed by the pleadings, or has been met in every material particular by the plaintiff's affidavits. In most respects this new evidence would be merely cumulative and of an im-

peaching nature. As the granting or refusing of a new trial upon the ground of surprise or newly discovered evidence rests largely in the discretion of the trial court, and as the record does not disclose an abuse of discretion in this instance, the ruling of the court below will not be disturbed. (*Francisco v. Benepe*, 6 Mont. 243, 11 Pac. 637; *Leyson v. Davis*, 17 Mont. 220, 42 Pac. 775, 31 L. R. A. 429; *Nyhart v. Pennington*, 20 Mont. 158, 50 Pac. 413; *Vogt v. Baldwin*, 20 Mont. 322, 51 Pac. 157; *Baxter v. Hamilton*, 20 Mont. 327, 51 Pac. 265; *Rand v. Kipp*, 27 Mont. 138, 69 Pac. 714; *State v. Brooks*, 23 Mont. 146, 57 Pac. 1038; *Smith v. Shook*, 30 Mont. 30, 75 Pac. 513.)

Touching the ground that the evidence is insufficient to justify the court's findings, it is enough to say that there was evidence to sustain each and all of them. The court saw the witnesses upon the stand, observed their demeanor while testifying, and passed upon their credibility in rendering its findings and decree. The testimony was very conflicting. Upon the facts presented in the record, this court will not disturb the findings and decision so made.

It follows that the judgment and order should be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order are affirmed.

PEARCE, APPELLANT, v. PEARCE, RESPONDENT.

(No. 1,831.)

(Submitted March 23, 1904. Decided April 19, 1904.)

Divorce—Custody of Children—Powers of Court.

Under Civil Code, Section 192, providing that in an action for divorce the court may, before or after judgment, give such direction for the custody of the

children as may seem necessary or proper, and may at any time vacate or modify the same, the court should, of its own motion, where the parents make no petition, inquire into the facts and make the necessary order for the custody of the children, and must do so when moved by either party, irrespective of whether such party was in default, or not, in the suit, or whether he or she was the guilty party; and, if a mistake is made in the first instance, the court should remedy the same, on a proper showing, as soon thereafter as possible.

Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

ACTION for divorce by Etta Pearce against Harry Pearce. There was a decree for plaintiff, and after decree the court entered an order vacating a portion of the decree awarding the custody of the child to plaintiff, and giving the custody to defendant, and plaintiff appeals. Affirmed.

Mr. M. Donlan, and Mr. J. E. Healy, for Appellant.

Messrs. Kirk & Clinton, for Respondent.

MR. JUSTICE MILBURN delivered the opinion of the court.

This is an appeal from the order of the district court made in the foregoing cause after final judgment therein. The order referred to gave the custody of the minor child of the parties to the defendant, and further ordered that, under an arrangement between him and John F. Charles and the latter's wife, the said child should remain in their care, custody and control, and that that portion of the decree theretofore entered in the divorce proceedings awarding the custody of the minor to the plaintiff until the further order of the court be vacated and set aside.

From the record it appears that the plaintiff sued the defendant for divorce, and that there was default of answer on the part of the defendant after demurrer overruled. The decree was entered upon proof after default, but it did not contain any reference to the child. Later on, the plaintiff appeared

and prayed for the custody of the infant; and, without notice to the defendant, it was ordered that the plaintiff have such custody until the further order of the court. Thereafter the defendant appeared and prayed that the custody of the child be awarded to him. He introduced proof to show that the plaintiff was immoral and not a proper person to have the care and custody of their child. He further showed that at the time of the divorce proceedings there had been an agreement made between him and his wife whereby the wife conveyed to her husband certain real property, and agreed that the custody of the minor child should be retained by the husband. He therefore prayed that he have the custody of the minor child, in accordance with the agreement so made, and for the reason that the mother was not a fit person. The court in this latter proceeding granted the prayer of the defendant, vacated that part of the decree awarding the custody of the child to the wife, and ordered that the father have the care and custody thereof as said herein above. The infant is a girl six years of age. The wife is the appellant herein.

The point is made by the appellant that the said contract by which it was agreed, under the circumstances narrated, that the husband should have the custody of the child, is void as against public policy. It is not necessary to discuss that question. Section 192 of the Civil Code is as follows: "In an action for divorce the court or judge may, before or after judgment, give such direction for the custody, care and education of the children of the marriage as may seem necessary or proper, and may at any time vacate or modify the same." We cannot understand how this language can be misunderstood, or how two persons can form different opinions as to what it means. The marriage laws are intended to establish families, and to protect children resulting from the conjugal union. When parents have unfortunate differences, and invoke the law of divorce for the purpose of separation, the prime duty of the court is to see that the infant children are protected; and if the parents do not, by proper petition, ask the court to make a proper order

for the care and protection of their helpless offspring, the court should and may of its own motion inquire into the facts and make the necessary order, and must do so when moved by either party, whether such party was in default, or not, in the suit, or is the guilty party. If it makes a mistake in the first instance, it may and should remedy the same, upon a proper showing, as soon thereafter as possible; and the law, in its beneficence, and with a tender care for the infants, has provided the means set forth in Section 192, quoted above.

Examining the record, we find sufficient evidence to support the court in the conclusion that "it appears to be for the best interests of the child, in respect of its temporal, mental and moral welfare, that the custody of said child be awarded to defendant, and that, under the said contract between the defendant and said John F. Charles and Mrs. John F. Charles, that the said minor be allowed to remain in the care, custody and control of Mr. and Mrs. John F. Charles, and that that portion of the decree which has been heretofore inserted in the original decree in the above entitled action, to-wit, 'and that plaintiff be adjudged to have the custody of the said minor child until the further order of this court,' be vacated and set aside."

It appearing upon sufficient evidence to the court below that Mr. and Mrs. Charles are proper persons to care for the child under an arrangement with the defendant, the order of the court appealed from should not be disturbed. The action of the court complained of appears to us, under the circumstances, to be just and proper.

There is not any prejudicial error appearing in the record and discussed in the brief.

Affirmed.

MUSIGBROD ET AL., RESPONDENTS, v. HARTFORD ET AL.,
APPELLANTS.

(No. 1,860.)

(Submitted April 19, 1904. Decided April 21, 1904.)

*Appeal—Failure to Enter Judgment—Effect—Refusal of Costs
—Appeal from Order.*

1. Where a suit is dismissed pursuant to a compromise agreement, and defendants neglect to have a judgment for costs entered in their favor, there is no judgment from which they can appeal.
2. An order refusing to allow costs is not reviewable, except on appeal from the judgment.

*Appeal from District Court, Granite County; Welling Nap-
ton, Judge.*

ACTION by Peter S. Musigbrod and another against James Hartford and others. From a judgment and order refusing defendants costs on a dismissal of the action, they appeal. Dismissed.

Mr. J. K. Macdonald, and Mr. T. Bailey Lee, for Appellants.

Mr. D. M. Durfee, for Respondents.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On April 11, 1902, these respondents commenced an action against appellants to restrain them from interfering with certain water rights owned by respondents. Upon the filing of the complaint, the court issued an order, directed to the appellants, to show cause why an injunction should not be granted as prayed for. This order was made returnable April 29, 1902. On April 30th the appellants filed an answer which denied the allegations of the complaint, but contained no counterclaim and

asked for no affirmative relief. On the same day a compromise agreement was signed by the parties to the litigation, and on motion of respondents the action was "dismissed without prejudice." Appellants then filed a memorandum of costs, including therein witness fees and sheriff's fees for summoning witnesses for the hearing on the order to show cause, aggregating \$201.50. On May 3d respondents moved the court to strike from the files such memorandum of costs, and on June 23d this motion was sustained. On August 14, 1902, appellants gave notice of an appeal from the judgment made and entered in the cause, and from the order of the court sustaining the motion to retax costs by striking the memorandum of costs from the files.

So far as this record discloses, no judgment was ever rendered or entered in the action. On the contrary, appellants, in their brief, say: "It is true no hearing was had, and no judgment was rendered in favor of defendants." Upon the dismissal of the action, appellants were doubtless entitled to a judgment for their costs; but, if they failed to have it entered, they are in no position to complain to this court. It is apparent, then, that there can be no appeal from the judgment, if no judgment was ever entered. Neither is there any appeal from the order of the court refusing to allow appellants costs. The costs are a part of the judgment, and all orders respecting the same are reviewable on the appeal from the judgment, and not otherwise. This has been determined so frequently by this court that it cannot now be considered open for argument. (*King v. Allen*, 29 Mont. 5, 73 Pac. 1107; *Spencer v. Mungus*, 28 Mont. 357, 72 Pac. 663; *Montana Ore Purchasing Co. v. Boston & Montana Consol. C. & S. Mining Co.*, 27 Mont. 288, 70 Pac. 1114; *Murray v. Northern Pacific Ry. Co.*, 26 Mont. 268, 67 Pac. 625.)

The appeals are dismissed.

Dismissed.

BURTON, RESPONDENT, v. KIPP, APPELLANT.

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(No. 1,834.)

(Submitted March 24, 1904. Decided April 22, 1904.)

*Execution Sale—Validity — Defect in Writ—Curative Act—
Judgment Roll—Parcels — Presumption of Regularity—
Agreement—Pleading.*

1. An allegation that an execution was issued before judgment was properly entered, being pregnant with the admission that judgment was in fact entered, is a mere conclusion of law, and presents no statement on which an issue of fact can be made.
2. A sale made under an execution defective by reason of its failure to contain the seal of the court is validated by Act of March 2, 1899 (Session Laws of 1899, p. 145), providing that all judicial sales of real property previously made to satisfy valid judgments shall be sufficient to sustain a sheriff's deed based on the sale, and all defects in the issuance of execution shall be disregarded.
3. Under Code of Civil Procedure, Section 1210, providing that a party may at any time within six months after the entry of judgment have an execution issued for its enforcement, the making up of the judgment roll, as required by Section 1196, is not a prerequisite to the issuance of execution.
4. Under Code of Civil Procedure, Section 1227, providing that all sales under execution shall be at auction, to the highest bidder, mere inadequacy of the price, not attended by fraud, mistake or surprise tending to influence the result, does not invalidate such a sale.
5. Under Code of Civil Procedure, Section 1225, prescribing the notice to be given of sales under execution, and Section 1226, providing that an officer selling without the notice prescribed forfeits \$500 to the aggrieved party. In addition to his actual damages, failure to give the notice does not invalidate the sale, the remedy provided being exclusive.
6. A court of equity will not interfere when the remedy at law is adequate.
7. Code of Civil Procedure, Section 1227, provides that, when real property sold under execution consists of several "known lots or parcels," they must be sold separately. Section 3266 states the legal presumption that official duty has been performed. *Held*, that it must be presumed that an officer complied with the statute in the sale of a city lot, though it was composed of two parcels and was sold in gross, since the parcels may not have been known, or may have been offered separately and sold in gross only after it was found that there were no bidders for the parcels.
8. An agreement whereby judgment creditors agreed that the judgment should not be enforced till a claim of a third party against them was settled was too indefinite as to time to be enforceable.
9. An agreement not to enforce a judgment till a claim of a third party against the judgment creditor should be settled was based on no consideration.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

ACTION by Ruth A. Burton against Henry Kipp. From an order granting a new trial after judgment of nonsuit, defendant appeals. Reversed.

STATEMENT OF THE CASE.

This action was brought, under Section 1310 of the Code of Civil Procedure, to have determined an adverse claim asserted by defendant to lot 12 in block 5 of the city of Butte, of which plaintiff claims to be the owner. It is in form an action *quia timet* to remove a cloud upon plaintiff's title

The complaint alleges that the plaintiff is the owner in fee and in possession of the premises; that the defendant claims some right or interest therein adverse to the plaintiff, but that such claim is without right. It then proceeds to allege, in substance, that the only interest the defendant has in the property is by virtue of a deed executed by the sheriff of Silver Bow county in pursuance of a sale thereof by said sheriff under an execution issued out of the district court upon a judgment recovered by the defendant against plaintiff in an action entitled "Henry Kipp v. Ruth A. Burton and A. A. Burton;" that said judgment was rendered and ordered entered on April 9, 1896; that on April 16th, but before the judgment "was properly entered, and before the judgment roll in the said action was made up," the defendant caused an execution to be issued thereon, and to be levied upon said property; that on May 11th the sheriff sold the property, and that it was purchased by the defendant for the sum of \$429.65, the amount of the judgment, with costs, etc.; that the sheriff made the sale without having first caused notice thereof to be posted and published properly as required by the statute; that the price received was grossly inadequate, in that the property was worth \$5,000; that the lot consisted of two separate and distinct parcels, each parcel having a building and appurtenances thereto, used for different purposes, but that the sale was made of the whole as one parcel; that, at the time the said judgment was recovered against plain-

tiff by defendant, one Rand, son-in-law of plaintiff, held an account against the firm of Kipp Bros., the defendant being a member thereof, amounting to \$485; that it was agreed that, inasmuch as this account was disputed, nothing would be done toward the enforcement of the judgment against plaintiff until after the settlement of the claim of Rand against the firm of Kipp Bros.; that suit was brought by Rand on this claim on May 14th, but had not been determined at the beginning of this action; that the agreement not to enforce the judgment against plaintiff until after the determination of the cause of *Rand v. Kipp Bros.* was made with defendant by Rand, as the agent of plaintiff, and that the issuance of execution and the sale made were in violation thereof; that before the commencement of this action the plaintiff tendered to defendant the full amount of his said judgment, with interest and costs of sale, and demanded a reconveyance of the property, but that he had refused to accept the tender and accede to her demand; and that she has paid to the clerk of the district court said amount for the use of the defendant. The prayer is that defendant be required to set forth the nature of his adverse claim, that it be declared without foundation, and that plaintiff have general relief. The answer puts in issue all the material allegations of the complaint, except that the defendant bases his adverse claim wholly upon the sheriff's deed, as alleged. This is admitted.

When the cause came on for trial, it was stipulated by counsel that the plaintiff was the owner and in possession of the property in controversy down to the date of the sheriff's deed, and that her possession still continues. The plaintiff then offered evidence tending to show that the sheriff failed to post and publish notice of the sale as required by the statute, and that plaintiff had in fact no notice of it; that the agreement was made, between the plaintiff, through Rand, her agent, and defendant, for stay of execution, as alleged; that the property consisted of separate parcels used for different purposes, and that the sale was made in gross; that it was worth \$5,000 and sold for \$429.65; that suit was actually begun by Rand against

Kipp Bros. soon after the said agreement was made; that tender had been made by plaintiff and refused by defendant, and that deposit of the amount thereof had been made with the clerk; and that execution was issued without the seal of the court. All of this evidence was excluded by the court upon objection by defendant that the complaint fails to state a cause of action, and judgment was entered for the defendant. The court thereafter sustained plaintiff's motion for a new trial. Defendant has appealed. The ground of the motion was the supposed error of the court in excluding the offered evidence.

Mr. C. M. Parr, for Appellant.

The complaint does not state facts sufficient to constitute a cause of action. (*Blood v. Light*, 38 Cal. 651; *Dodge v. Walley*, 22 Cal. 224; *Donahue v. McNulty*, 24 Cal. 412; *Hihn v. Peck*, 30 Cal. 281; *Townsend v. Olin*, 5 Wend. 207; *Rorer on Judicial Sales*, Sec. 716, 449; *Tooney v. Purkey*, 1 Mill (S. C.) 159; *Cooper v. Galbraith*, 3 Wash. (C. C. R.) 550; *Hunt v. Loucks*, 38 Cal. 382; *Code of Civil Procedure*, Secs. 1210, 1211, 1226; *Hastings v. Cunningham*, 39 Cal. 144; *Van Cleave v. Bucher*, 79 Cal. 600; *Los Angeles Bank v. Raynor*, 61 Cal. 145; *Freeman on Executions*, Par. 10, 24, 286, 334, 339; *Graham v. Lynn*, 39 Am. Dec. 493; *Black on Judgments*, Vol. 1, Sec. 106; *Lick v. Stockdale*, 18 Cal. 219; *Sharp v. Lumley*, 34 Cal. 611; *Hahn v. Kelly*, 34 Cal. 391; *Smith v. Randall*, 6 Cal. 47, 65 Am. Dec. 475; *Shores v. Scott*, 17 Cal. 628; *Frink v. Roe*, 70 Cal. 296; *Hollister v. Vanderlin*, 30 Atl. Rep. 1002; *Bank v. Fair Association*, 48 N. W. Rep. 852; *Felton v. Felton*, 34 Atl. 312; *Gunn v. Slaughter*, 9 S. E. Rep. 772; *Fulton v. Seipen*, 34 Atl. 680; *House v. Robertson*, 30 S. W. Rep. 640; *Robb v. Hanna*, 14 S. W. Rep. 360; *Railway Co. v. Creed*, 11 Pac. 772; *Cake v. Cake*, 26 Atl. 781; *Greenup v. Stoker*, 52 Am. Dec. 474; *Stockton v. Owings*, 12 Am. Dec. 302; *Gasner v. Patterson*, 23 Cal. 302; *Tripp v. Cooke*, 26 Wend. 142; *Freeman on Executions*, Secs. 309-1051; *White v. Cole*, 24 Wend. 125; *Conway v. John*, 23 Pac. 170; *Cole-*

man v. Bank, 49 Am. Dec. 671-673; *Carson v. Ambrose*, 183 Pa. St. 88; *Hopper v. Davis*, 70 Ill. 682; Kleber on Void Judicial Sales, Sec. 358; *Riddell v. Harrell*, 71 Cal. 254; *Hoffman v. Whitten*, 20 S. W. Rep. 617; *Craig v. Stevens*, 18 N. W. Rep. 510; *Gleason v. Hill*, 2 Pac. 413; *Bunker v. Rand*, 19 Wis. 253; *Williams v. Allison*, 33 Iowa, 378; *Rector v. Hartt*, 41 Am. Dec. 650; *Cunningham v. Cassidy*, 17 N. Y. 276; *Griswold v. Stoughton*, 84 Am. Dec. 409; *Bouldin v. Ewart*, 63 Mo. 330; *Foley v. Kane*, 53 Iowa, 64; *Bell v. Taylor*, 14 Kan. 277; *Smith v. Schultz*, 68 N. Y. 41; *Lumberman v. Bank*, 24 Minn. 281; *Vigoreaux v. Murphy*, 54 Cal. 346; *Ahlstrom v. Fitzpatrick*, 17 Mont. 295; Randolph on Com. Paper, Secs. 1819-1820; *Atlantic Nat'l Bank v. Franklin*, 55 N. Y. 238; *Baggs v. Ives*, 17 Wend. 501; *Stalker v. McDonald*, 6 Hill, 93, 114; *Ward v. Wick*, 17 Ohio St. 159; *Jenkins v. Clarkson*, 7 Ohio St. 72; *Benson v. Harrison*, 39 Mo. 303; *Boardman v. Larrabee*, 51 Conn. 39; *Ives v. Lieser*, 10 Mont. 5; *Hale v. Forbis*, 3 Mont. 395; Note on page 526 of 60 Am. Dec.; Session Laws of Montana, 1899, page 34; *Row v. Blake*, 44 Pac. 1084; *Newton v. State Bank*, 58 Am. Dec. 370, note; *Swiggart v. Harber*, 39 Am. Dec. 430, note; Van Fleet on Collateral Attack, pp. 4, 5; 12 Am. & Eng. Ency. of Law, 147; Freeman on Executions, page 1931; *Bernard v. Herzog*, 12 Mont. 519; *Cabell v. Grubb*, 48 Mo. 353; *Norton v. Quinby*, 45 Mo. 388; *Rigg v. Cook*, 4 Gilm. 336; *Durham v. Heaton*, 28 Ill. 264, 81 Am. Dec. 275; *Jackson v. Spink*, 4 Chic. L. N. 309; *Kelsey v. Dunlap*, 7 Cal. 160; *Stetson v. Freeman*, 35 Cal. 523; *Oram v. Rothermil*, 98 Pa. St. 300; *Hering v. Chambers*, 103 Pa. St. 172; *Nagle v. Macy*, 9 Cal. 426; *Winchester v. Winchester*, 1 Head, 460; Freeman on Executions, Secs. 74, 76, 77; *Roush v. Fort*, 2 Mont. 485; *Martin v. Parsons*, 49 Cal. 99.)

As to imperfection in the writ of execution, and validity of writ having no seal. (*Van Cleave v. Bucher*, 79 Cal. 600; *Hibbard v. Smith*, 50 Cal. 519; *Pecolle v. Oliver*, 2 Idaho, 231; *State v. Cassidy*, 4 S. Dak. 62; *Corwith v. State Bank*, 86 Am.

Dec. 796; *Arnold v. Nye*, 23 Mich. 286; Nebraska Code of Civil Proc. Sec. 880; *Taylor v. Courtney*, 15 Neb. 190; Freeman on Executions, Sec. 46, note 2; 8 Ency. Pl & Pr. page 403; *Scott v. Rushman*, 1 Cow. 212; *Kyle v. Evans*, 3 Ala. 481; *Hall v. Lackmond*, 50 Ark. 113, 7 Am. St. Rep. 84; *Whiting v. Beebe*, 12 Ark. 421; *Mitchell v. Conley*, 13 Ark. 414; Gould's Dig. c. 133, Sec. 116; *Kahn v. Kuhm*, 44 Ark. 404; *Rice v. Dale*, 45 Ark. 34; *Jett v. Shinn*, 47 Ark. 373; *Blank v. Rector*, 24 Ark. 496, 88 Am. Dec. 780, 7 Am. Dec. 85, note; *Mitchell v. Duncan*, 7 Fla. 13; *Deter v. Akin*, 40 Ga. 423; *Warmath v. Dryden*, 125 Ind. 355; *Hunter v. Burnsville Turnpike Co.*, 56 Ind. 213; *Rose v. Ingram*, 98 Ind. 276; *Bridewell v. Mooney*, 25 Ark. 524; *Sawyer v. Baker*, 3 Me. 29; *Wright v. Nostrand*, 94 N. Y. 31; *People v. Dunning*, 1 Wend. 16; *Dominick v. Eacker*, 3 Barb. 18; *Dominick v. Ill. State Bank*, 18 Wis. 86, 86 Am. Dec. 763; *Porter v. Haskell*, 11 Me. 177; *Toof v. Bently*, 5 Wend. 276; *Boal v. King*, 6 Ohio, 11; *Filkins v. Brockway*, 19 Johns. 170; *Aetna Ins. Co. v. Hallock*, 6 Wall. 556; *Wolf v. Cook*, 40 Fed. 432; Alderson, Jud. W. & P. Sec. 33; Montana Code of Civil Proc. Sec. 110, Subd. 8; *Choate v. Spencer*, 13 Mont. 136; Montana Code of Civil Proc. Sec. 774; *Barber v. Briscoe*, 9 Mont. 34; 17 Ency. of Pl. & Pr. page 920, 20; *Church v. English*, 81 Ill. 442; Freeman on Executions, Sec. 71.)

The legislature has the power to pass curative statutes. (*Thomson v. Lea County*, 70 U. S. 327; *Breyell v. Norris*, 25 Ohio St. 308; *Bernier v. Becker*, 37 Ohio St. 72; *Johnson v. Hall*, 90 Wis. 19; *Frisby v. Singer*, 90 Wis. 608; *Wharton v. Cunningham*, 46 Ala. 590; 3 Am. & Eng. Ency. of Law, p. 760; Cooley on Const. Lim. 371; Sutherland, Stat. Const. Sec. 483.)

Mr. John J. McHatton, for Respondent.

The appellant did not demur to the complaint, or make any objection thereto, but filed his answer, denying the allegations thereof; by answering, the defendant waived any defect of

statement in the cause of action contained in the complaint. (*Sanford v. Newell*, 18 Mont. 127.)

A defective complaint is cured when the material facts omitted therefrom, if any, are admitted or supplied by the answer. (*Hershfield v. Aiken*, 3 Mont. 450; *Crowder v. McDonnell*, 21 Mont. 367; *Wilson v. Harris*, 21 Mont. 385.)

Where the defendant joins in the trial of an issue, he cannot object in the supreme court that the complaint is insufficient to raise such issue. (*First Nat'l Bank v. Merchants' Bank*, 19 Mont. 588.)

An answer which assumes that those allegations are in the complaint which it should properly contain supplies their omission. (*Lynch v. Bechtel*, 19 Mont. 551.)

The point of an objection to the reception of evidence and the reason for it must be stated in the court below and saved in a bill of exceptions. (*Story v. Black*, 5 Mont. 44.)

An objection that there is no foundation for the introduction of evidence cannot be raised for the first time on appeal. (*Hogan v. Schuart*, 11 Mont. 498, 505; *Lawlor v. Kemper*, 20 Mont. 13, 18.)

The point of an objection must be stated to enable the court to correct its own errors and to enable the party to remove the objection, if possible. (*Story v. Black*, 5 Mont. 26, 44.)

The complaint states a cause of action to quiet title. (Code of Civil Procedure, Sec. 1310; *Angus v. Craven et al.*, (Cal.) 64 Pac. 1091; 17 Ency. of Pl. & Pr. 277, 279, 326, 336, 332, 334; *Brusic v. Gates*, 80 Cal. 462, 465; *Blood v. Light*, 38 Cal. 649; *Peterson v. Weisobcin*, 75 Cal. 178; *Bullard v. McCardle*, 98 Cal. 357; *Real Estate Co. v. Hendrix*, 28 Ore. 491; *Herr v. Broadwell*, 5 Colo. App. 469; *Lehnhardt v. Jennings*, 119 Cal. 193, 196; *Carpenter v. Stillwell*, 11 N. Y. 71.)

When real estate sold under execution consists of several parcels, it must be sold separately. (Code of Civil Proc. Sec. 1227; *Vigoreux v. Murphy*, 54 Cal. 346; *San Francisco v. Pixley*, 21 Cal. 57; 2 Freeman on Executions, Secs. 296, 308; *Frink v. Roe*, 70 Cal. 303; *Blood v. Light*, 38 Cal. 654; *Hib-*

must be given as provided by law. (Code of Civil Proc. Sec. 1225; Freeman on Executions, Sec. 286.)

Inadequacy of price, where it shocks the conscience, is sufficient to set aside the sale. (*Davenport v. Moore*, 74 Fed. 953; *Magann et al. v. Segal et al.*, 92 Fed. 252; *Schroeder v. Young* 161 U. S. 333, L. E. 725, note; *Graffau v. Burgess*, 117 U. S. 180, L. E. 839; *Hudephol v. Water Co.*, 94 Cal. 588, 29 Pac. 1025.)

A sheriff is only a ministerial officer, and, as such, executes the mandates and carries into effect the judgments of courts within his own county. (Mechem on Pub. Off. Secs. 657, 742; 12 Am. & Eng. Ency. of Law, 525; Secs. 1224-1227, Code of Civil Procedure.)

Forbearance to enforce a claim, legal or equitable, is a sufficient consideration for a promise. (Civil Code, Sec. 2160; *Stewart v. McGuin*, 1 Cow. 99; *Ward v. Fryer*, 19 Wend. 494; *Hartford Ins. Co. v. Olcott*, 97 Ill. 439.)

A consideration moving from or to a third person will support a contract. (6 Ency. of Law, 2d Ed., 685, and cases cited in note 3.)

The execution is void for want of a seal. (Code of Civil Proc. Sec. 1211; *State ex rel. Sackett v. Thomas*, 25 Mont. 226, 235; *Aetna Ins. Co. v. Hallock*, 6 Wall. 556, L. E. 948, 9; *Choate v. Spencer*, 13 Mont. 127, 133, 20 L. R. A. 424, note; *Sharman v. Huot*, 20 Mont. 555; 11 Am. & Eng. Ency. of Law, (N. S.) 645; 8 Ency. Pl. & Pr. 404; *Hunt v. Loucks*, 38 Cal. 372, 378; *Lee v. Newkirk*, 18 Cal. 550; *Herr v. Broadwell*, (Colo.) 39 Pac. 70; *Woodcock v. Bennett*, 1 Cow. 711; *M. B. L. Ins. Co. v. Winne*, 20 Mont. 20, 31.)

A void writ of execution can derive no validity from the defendant's inaction; he is not bound to move to set aside or vacate it. (Freeman on Executions, Sec. 73, p. 167; 28 Am. & Eng. Ency. of Law, p. 474.)

A sale will be set aside where there has been fraudulent conduct in the purchaser. (*Roush v. Fort*, 2 Mont. 482, 486; *King v. Platt*, 37 N. Y. 160.)

A void judgment or process cannot be made valid by a subsequent statute. (*Nelson v. Roundtree*, 23 Wis. 367; *Marwell v. Goetschius*, 11 Vroom (N. J.), 383, 29 Am. Rep. 242, 48, 50; Cooley's Const. Lim. pp. 102-110, 126; 1 Kent's Comm. p. 456; *Pryor v. Dorney et al.*, 50 Cal. 388, 400; *Reis v. Lawrence*, 63 Cal. 138; *Robertson v. Bradford*, 70 Ala. 388; *Sidway v. Lawson*, 58 Ark. 122; *Israel v. Arthur*, 7 Colo. 11, 1 Pac. 438; *Yeatman v. Day*, 79 Ky. 190; *Grady v. Dundon*, 30 Ore. 388, 47 Pac. 915; *Wells-Fargo Co. v. Clarkson*, 5 Mont. 336, 342; *McDaniel v. Correll*, 19 Ill. 226; *Sharman v. Huot*, 20 Mont. 555, 557.)

MR. CHIEF JUSTICE BRANTLY, after stating the case, delivered the opinion of the court.

If the complaint states a cause of action, the district court was right in ordering a new trial; otherwise the order must be reversed. The question for decision therefore is, are the allegations of the complaint sufficient to make out a *prima facie* case that the sale was avoided by reason of the inadequacy of the price, or for want of notice by the sheriff, or because the property was sold in gross, or by reason of a violation by the plaintiff of the agreement for delay?

1. Before noticing these features of the case, we remark that the allegation of the complaint touching the entry of judgment is pregnant with the admission that judgment was in fact entered before the writ was issued, for the allegation is that the judgment was not properly entered. Wherein the entry was defective, if such was the case, is not pointed out. There is presented no statement in this allegation upon which an issue of fact may be made. It is merely a bald conclusion of law, which is wholly insufficient.

Touching the failure of the clerk to affix the seal to the writ, we refer to the decision in the case of *Kipp v. Burton*, 29 Mont. 96, 74 Pac. 85, wherein it was held that the omission of this duty on the part of the clerk rendered the sale voidable, not void, and that in any event the defect was cured and the sale

validated by the Act of March 2, 1899 (Session Laws 1899, p. 145). Furthermore, the complaint does not refer to this feature of the sale as a ground of relief in this action. Again, the statute (Code of Civil Procedure, Sec. 1210) declares that a party in whose favor judgment is given may at any time within six years after the entry thereof have a writ of execution issued for its enforcement. The making up of the judgment roll required by Section 1196 is not made a prerequisite to the issuance of execution. The roll must be made after judgment has been entered, not before. If the writ may be issued at any time after entry of judgment, it may, of course, be enforced, whether the duty enjoined upon the clerk by Section 1196 has or has not been performed. (*Sharp v. Lumley*, 34 Cal. 611.)

2. As to the inadequacy of consideration: The requirement of the statute is that all sales of property under execution shall be made at auction to the highest bidder. (Code of Civil Procedure, Sec. 1227.) It is not alleged that the sale in question was attended by any irregularity on the part of the sheriff or the plaintiff in the writ, or that any mistake, surprise, accident, misconduct or fraud intervened, by which the inadequacy of price was brought about. There is nothing alleged from which even a remote inference can be drawn that the sale was not properly conducted, in the utmost good faith, or that the sheriff or the plaintiff in the writ did anything to prevent competition in the bidding. So far as the allegations show to the contrary, the small price realized may have been the result of lack of bidders, or incumbrances upon the property, or a variety of other causes over which the sheriff and the plaintiff had no control, or with which they had no connection. The plaintiff had the right to collect his judgment. He was under no obligation to bid more than he deemed proper—certainly not more than the amount of his judgment. He was at liberty to act as he chose in the matter; leaving it to others to bid above him, or to the defendant to redeem within the statutory time for redemption. This provision for redemption was ample protection to the plaintiff against the sacrifice of her property, and it is

not alleged that she did not have the knowledge and opportunity to avail herself of this protection before the time for redemption had expired. Mere inadequacy of price, not attended by circumstances of fraud, misconduct, accident, mistake or surprise tending to influence the result, is not sufficient to invalidate such a sale. Otherwise the mere lack of competitive bids, or the intervening of any like circumstance whereby the price realized should be deemed inadequate, would be sufficient to render questionable the title obtained by sale under execution. (*First Nat'l Bank of Deadwood v. Black Hills Fair Ass'n*, 2 S. Dak. 145, 48 N. W. 852; *Hollister v. Vanderlin*, 165 Pa. St. 248, 30 Atl. 1002, 44 Am. St. Rep. 657; *House et al. v. Robertson*, (Tex. Civ. App.) 34 S. W. 640; *Carson v. Ambrose*, 183 Pa. St. 88, 38 Atl. 508; *Felton v. Felton*, 175 Pa. St. 44, 34 Atl. 312; *Fullerton v. Seiper*, (N. J. Ch.) 34 Atl. 680; *Smith v. Randall*, 6 Cal. 47, 65 Am. Dec. 475; *Ingram v. Belk*, 2 Strobhart's Law, 207, 47 Am. Dec. 591; *Central Pac. R. R. Co. v. Creed*, 70 Cal. 497, 11 Pac. 772.) This rule obtains generally with reference to judicial sales, as well as to sales under execution, and is applied more rigorously in those states in which the right of redemption exists. A gross inadequacy of price is competent, so far as it goes, to establish fraud; but it is not in itself, in the absence of other circumstances tending to show fraudulent behavior on the part of the sheriff or the plaintiff in the writ, enough to warrant the presumption that the sale was fraudulent.

3. The statute provides that notice shall be given by posting written notices, particularly describing the property, for twenty days, in three public places in the township or city where it is situated, and also where the sale is to take place, which may be at the courthouse or on the premises, and by publication of a copy thereof once a week for the same period in some newspaper published in the county. (Code of Civil Procedure, Sec. 1225.) Section 1226 declares that "an officer selling without the notice prescribed by the last section forfeits five hundred dollars to the aggrieved party, in addition to his actual damages." It will

be observed that the allegation of want of notice in the complaint is also pregnant with the admission that some sort of notice was given; but, assuming the allegation to be sufficient to present an issue on this point, was the sale therefore void? Counsel for respondent makes the contention that the provisions of Section 1225, *supra*, are mandatory, and must be strictly pursued. This is the rule in some of the states, particularly where sales not made in strict conformity with the statute are declared by the statute itself to be void. This rule prevails in Tennessee. (*Lafferty v. Conn*, 3 Sneed, 221; *Lloyd v. Anglin's Lessee*, 7 Yerg. 428.) But in the absence of such a provision in the statute itself, the preponderance of authority is in favor of the view that the requirement as to notice is directory only, and that the failure to observe it does not avoid the sale as against a purchaser who is himself free from fault. (2 Freeman on Executions, 2d Ed., Sec. 286; *Smith v. Randall*, 6 Cal. 47, 65 Am. Dec. 475; *Blood v. Light*, 38 Cal. 649, 99 Am. Dec. 441; *Frink v. Roe*, 70 Cal. 296, 11 Pac. 820; *Webber v. Cox*, 6 T. B. Mon. 110, 17 Am. Dec. 127; *Hayden v. Dunlap*, 3 Bibb. 216; *Ware v. Bradford*, 2 Ala. (N. S.) 676, 36 Am. Dec. 427; *Brooks v. Rooney*, 11 Ga. 423, 56 Am. Dec. 436; *Maddox v. Sullivan*, 2 Rich. Eq. (S. C.) 4, 44 Am. Dec. 234, and cases cited in note.)

For another reason the sale is not void for want of notice. If we construe together the sections of the statute cited *supra*, we must conclude that it was the intention of the legislature to provide by Section 1226 an adequate remedy for a default on the part of the sheriff in the matter of notice. The remedy provided is not that the sale shall be void, but that the sheriff shall forfeit the sum of \$500 to the aggrieved party, and, besides, pay such damages as may be actually suffered by him. This remedy must be deemed exclusive, upon the theory that a court of equity will not interfere when the remedy at law is adequate. (*Smith v. Randall*, 6 Cal. 47, 65 Am. Dec. 475.)

4. It is argued that the lot consists of two parcels—the north half and the south half—and that the sale of the whole as one

parcel was such an irregularity that it should be held to vitiate it. Section 1227 of the Code of Civil Procedure provides that, "when the sale is of real property consisting of several known lots or parcels, they must be sold separately." It also provides that in such case, if the debtor is present and directs the order in which the parcels shall be sold, the sheriff shall follow such direction. Adopting, for the purpose of this case, the theory of the plaintiff that these provisions are mandatory, and that a sale made in violation of them is void, the allegations of the complaint are not sufficient to bring the case within the purview of the statute. The property must, under its terms, consist not only of lots or parcels, but of known lots or parcels. It might be in a particular case that the situation and description of the lands sold would be sufficient to indicate that they were known lots or parcels, or that they were of an area so great in extent that it would be the manifest duty of the sheriff to sell them in parcels; but this inference would not be indulged with reference to a single lot of small area in a city, such as is the case here. The law presumes that official duty has been performed (Code of Civil Procedure, Sec. 3266), and this presumption must be indulged until rebutted by sufficient allegation and proof. So far as the pleadings show, the property may actually have been offered in different lots, and sold in gross only after it was found that there were no bidders for the different parcels. In such case the sale may lawfully be made in gross, for the creditor is not to be foreclosed of his effort to collect his debt by the mere want of bidders for the different parcels. Here, again, the provision for redemption affords protection to the debtor; and, in the absence of a specific allegation of circumstances tending to show that plaintiff was prevented from availing herself of this protection, she should not be heard to complain.

5. The last point made is that the sale is void because made in violation of an agreement on the part of the defendant with the agent of the plaintiff that the judgment against the plaintiff should not be enforced until the settlement of the claim of Rand

against the firm of Kipp Bros. had been made. It is sufficient to say of this agreement that it was for no definite time, and, so far as the complaint shows, was based upon no consideration. By it Rand did not bind himself to bring suit against Kipp Bros., or to have a settlement of his claim with them within any definite time; nor did the defendant in this case undertake to extend the delay to any definite time upon any consideration whatever. The agreement, at most, amounts merely to a voluntary promise on the part of Kipp, without consideration, to extend the time for the payment of the judgment. This was not binding upon him. Even if it were, the plaintiff does not allege that she was so deceived or misled by the agreement that she for that reason failed to pay the judgment against her or redeem the property after the sale.

The most that can be said of any of the defects in the proceedings of the sheriff resulting in his deed to the defendant is that they rendered the sale voidable only. Should this be conceded, however, the plaintiff is not entitled to relief, for the reason that the Act of the legislature cited *supra* cured all of these defects, and rendered the defendant's title good. (*Kipp v. Burton, supra.*)

The evidence was properly excluded. It follows that the order must be reversed.

Reversed.

MILLER, APPELLANT, v. NORTHERN PACIFIC RAILWAY COMPANY, RESPONDENT.

(No. 1,826.)

(Submitted March 22, 1904. Decided April 22, 1904.)

Actions—Dismissal by Plaintiff—Payment of Costs—Statutory Construction.

1. Under Code of Civil Procedure, Section 1004, Subdivision 1, the payment of defendant's costs is not a prerequisite to the exercise of plaintiff's right to dismiss the action.
2. When a plaintiff at any time before trial files a *praecipe* with the clerk for the dismissal of the action, and the dismissal has been entered on the register of actions, the case is dismissed, and has passed beyond the jurisdiction of the court, save for the sole purpose of entering a judgment for costs in favor of defendant under Section 1008, Code of Civil Procedure.

Appeal from District Court, Yellowstone County; C. H. Loud, Judge.

ACTION by George A. Miller against the Northern Pacific Railway Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Mr. Gib. A. Lane, and Messrs. Walsh & Newman, for Appellant.

Mr. William Wallace, Jr., and Mr. C. A. Donnelly, for Respondent.

MR. COMMISSIONER CLAYBERG prepared the following opinion for the court:

Appeal from judgment of the district court of Yellowstone county. Suit was instituted in justice's court by Miller (appellant) against the railroad company (respondent). Trial was had, which resulted in a judgment in favor of plaintiff for \$150 and costs, from which defendant has appealed to the district court.

After the filing of the justice's transcript in the district court, and on the 28th day of August, 1901, plaintiff's attorney filed the following *praecipe* in the district court: "To the clerk of said court: Please dismiss the above-entitled action on motion of plaintiff at the cost of plaintiff, costs tendered herewith." The clerk thereupon made the following entry on his register of actions: "This action is hereby dismissed at plaintiff's cost. \$7.50 deposited as costs with the clerk." On September 27, 1901, defendant (respondent here) filed a motion "to set aside

the so-called entry of dismissal made by the clerk of this court in the above-entitled action" upon certain grounds, which are immaterial to the consideration of the questions involved herein. This motion was sustained by the court. On the 21st day of October, the judge of the court, at Miles City, Custer county, at the request of counsel for defendant, set the case for trial at 9 a. m. on October 29, 1901, and upon that day ordered judgment for defendant for \$188.50 costs, which included \$155.60 for fees of witnesses who were subpoenaed on October 29, 1901. Plaintiff made a motion to tax costs, objecting to this and other items, which motion was overruled.

The only important question to be determined is, what was the effect of the action of plaintiff's attorney in filing the *prae-*cipe for dismissal, and of having the dismissal entered in the clerk's register of actions on August 28, 1901?

The provisions of Section 1004 of the Code of Civil Procedure, in so far as involved herein, are: "An action may be dismissed, or a judgment of nonsuit entered in the following cases: (1) By the plaintiff himself, at any time before trial, upon payment of costs; provided, a counterclaim has not been made or affirmative relief sought by the answer of the defendant." This section also provides: "The dismissal mentioned in the first two subdivisions is made by entry in the clerk's register."

The court has lately decided that the mere filing of a *praecipe* does not constitute a dismissal of the case, but that the statute "contemplates a formal entry of dismissal by the clerk in his register." (*Kinman v. Scheuer*, 30 Mont. 73, 75 Pac. 690.) Section 1008 of the Code of Civil Procedure provides that, "upon the dismissal or disposition of an action in which the court has jurisdiction of the subject matter of the action, it is the duty of the court to render such judgment for costs."

A brief resume of the legislative history of Sections 1004 and 1008 seems important, in order to arrive at a correct construction of their terms. Section 1004 appeared in Codified Statutes of 1872 substantially as it is in the Code, with the exception that

at the end of the section were the words "Judgment may thereupon be entered accordingly." (Civil Practice Act, Codified Statutes, 1871-72, Section 184, page 63.) The same appears in the Revised Statutes of 1879 (Code of Civil Procedure, Sec. 234, Revised Statutes, 1879, p. 81). In 1874 the legislature of the territory adopted a section (numbered 18) which was as follows: "Upon the dismissal or other disposition of an action in which the court has jurisdiction of the subject matter of the action, it shall be the duty [of] the court to render such judgment for costs as is according to law." (Laws of 1874, Sec. 18, p. 54.) It will be noticed that this section is almost identical with our present Section 1008, Code of Civil Procedure. This section was not incorporated in the Revised Statutes of 1879 as a part of the chapter on "Judgments," but appeared in a separate chapter, bearing the title "Unrepealed Laws." (Section 819, Rev. St. 1879, p. 191.) In the compilation of 1887 this section was incorporated for the first time in the chapter entitled "Judgments in General," and appears therein as Section 244, Code of Civil Procedure (Compiled Laws 1887), which chapter included our present Section 1004 in the same form as it appeared in the Laws of 1872 and 1879. By the Code of 1895, however, we find the words "judgment may thereupon be entered accordingly" stricken out, so that this provision of section now reads as above quoted.

A slight amendment was also made to Section 244 of the Compiled Laws of 1887, and as amended the provisions were re-enacted in our Section 1008.

The same statute was in force in California from 1859 (Laws 1859, Sec. 148) until amended; and that court uniformly held, prior to such amendment, that it became the duty of the clerk, when the *praecipe* for dismissal was filed, and he had entered the dismissal on the register of actions, to immediately thereafter enter a judgment of dismissal, and that the suit was not dismissed until such judgment had been entered. (*Page v. Superior Court*, 76 Cal. 372, 18 Pac. 385; *Page v. Page*, 77 Cal. 83, 19 Pac. 183; *Brady v. Times-Mirror Co.*, 106 Cal. 56, 39 Pac. 209.)

There can be no doubt but that when the previous sections, displaced by the present Section 1004, were first enacted, the purpose of the language of Subdivision 1, "upon payment of costs," referred exclusively to the costs which were necessary to be paid to the clerk for entering such dismissal and judgment. It will be noticed that Subdivision 1, as originally enacted, did not require the payment of *defendant's* costs, but the "payment of costs." What costs? Surely no costs except those then required by the statute for entering the order and judgment of dismissal. Under our present statute, no costs are allowed to the clerk for the entry of such order, and no judgment of dismissal is required to be entered. Upon the payment to the clerk of the statutory fee upon institution of the suit, nothing further need be paid until the entry of final judgment. Therefore the words "upon payment of costs" have become inoperative. Undoubtedly the failure to eliminate them from Subdivision 1 at the time when the words "judgment may thereupon be entered accordingly" were eliminated was a mere oversight of the legislature.

Under the laws of 1874, 1879 and 1887, it is very apparent that the entry of two judgments was contemplated: (1) A judgment of dismissal, to be entered by the clerk; and (2) upon such dismissal a judgment for costs, to be rendered by the court. These two judgments were separate, several and distinct. One simply dismissed the suit, and the other, after the dismissal became effective, pronounced and fixed a liability against the plaintiff for the defendant's costs in the action, specifying the amount thereof. The legislature undoubtedly recognized this peculiarity; and determined that two judgments were not necessary. So it provided that the dismissal should be complete upon entry in the clerk's register, and that, if the defendant was entitled to costs, he might, after the dismissal, make an application to the court for a judgment for costs, under Section 1008, Code of Civil Procedure. It must be remembered that this section provides, "Upon dismissal * * * it is the duty of the court to render such judgment for costs." Defendant is therefore not entitled to this judgment until after dismissal.

After the decision of the cases of *Page v. Superior Court*, 76 Cal. 372, 18 Pac. 385, and *Page v. Page*, 77 Cal. 83, 19 Pac. 183, the legislature of California amended the section of that Code—which before that time had been identical with ours, as found in the Compiled Laws of 1887 and the Codified Statutes of 1872 and the Revised Statutes of 1879—by eliminating the same words which our legislature eliminated in adopting the Codes. After this amendment the entire matter came before the supreme court of that state in the case of *Hopkins v. Superior Court*, 136 Cal. 552, 69 Pac. 299. In that case the plaintiff in an action for divorce filed a proper notice of dismissal of her action with the clerk of the court, and directed the clerk to enter an order of dismissal. This the clerk refused to do, basing his action upon an order of the court directing that all proceedings in relation to the dismissal be stayed unless the plaintiff pay defendant the amount of his costs, and, if plaintiff failed to make such payment, then the attempted dismissal be annulled and set aside. Plaintiff refused compliance with the order, and objected to further order of the court staying the entry of the order and setting the action for trial, and sued out an alternative writ of prohibition to restrain the court from proceeding further in the matter.

The opinion in this case is so directly in point in the consideration of the question here involved that we quote from it: “The only costs which a plaintiff is required to pay before dismissal of his action are the clerk’s costs. * * * In *Hancock Ditch Co. v. Bradford*, 13 Cal. 637, which case arose under provisions of the practice act regarding dismissals, to the effect ‘that the plaintiff may at any time before trial, upon the payment of costs,’ take a nonsuit, it is said: ‘We do not understand that the plaintiff is bound to tender the costs before being entitled to be nonsuited, for the costs cannot be at the moment known or computed. But this proviso was only meant to declare that the effect of the nonsuit is to subject him to costs.’ So here, whatever may be the rights of the defendant to recover his costs upon plaintiff’s dismissal of the action, that right arises only

after dismissal, and the prepayment of defendant's costs, under all of the decisions, is not a prerequisite to the exercise of plaintiff's right. The clerk is not charged with the judicial functions of taxing costs and settling a cost bill. He cannot say what costs of the defendant the plaintiff is under obligation to pay. The utmost of a defendant's right, under the circumstances, is to present his cost bill in due time after dismissal, to have it settled, and take judgment for his costs against plaintiff accordingly. It appears, therefore, that plaintiff had done everything that the statute required, and stood entitled, as an absolute right, to have her order of dismissal entered. In this she was prevented by the order of the court directing the clerk to refuse to enter the order until plaintiff had complied with an illegal condition. * * * Here the plaintiff applied to the court, in furtherance of her right thus clearly pointed out, and the court not only refused her the right, but imposed upon her an illegal condition as the price of her order of dismissal. This the court had no right to do. Its sole power and its sole jurisdiction, under the circumstances indicated, was to have ordered the proper entry of dismissal in the register. Its refusal to do this, and its subsequent order setting the case for trial, were unwarranted and in excess of its jurisdiction. Against this it is urged that in *Page v. Superior Court* it was decided that the action was still pending until judgment of dismissal was 'entered accordingly.' At the time of the decision in the *Page Case* the statute declared (Code Civil Proc. Sec. 581) an action may be dismissed * * * in the following cases: 'By the plaintiff himself at any time before trial upon payment of costs. * * * The dismissal mentioned in the first two subdivisions is made by entry in the clerk's register; judgment may thereupon be entered accordingly.' In the *Page Case*, though the order of dismissal had been given, and the entry in the clerk's register made, the judgment had not been actually entered, and the ruling in *Page v. Superior Court* is based wholly upon this omission. Subsequently the legislature, with design, amended this section by eliminating the provision

‘that judgment may thereupon be entered accordingly,’ so that it now reads, and read at the time this question arose: ‘The dismissals mentioned in Subdivisions 1 and 2 hereof are made by entry in the clerk’s register.’ * * * No judgment is any longer required to be entered. The mere entry of the order upon the clerk’s register of actions is sufficient.”

We therefore conclude that a plaintiff may, at any time before trial, file a *praecipe* with the clerk for the dismissal of the action, and direct the clerk to enter dismissal on the register of actions, and when such acts have been performed the case is dismissed, and has passed entirely beyond the jurisdiction of the court, except for the purpose of entering a judgment for costs in favor of the defendant under Section 1008, if the defendant so demands.

The proper *praecipe* for dismissal having been filed, and the dismissal having been properly entered by the clerk, the court was without jurisdiction to take any further steps in the action, save to render a judgment for defendant’s costs then accrued, if applied for by defendant.

We therefore advise that the judgment appealed from be reversed, and the court below directed, upon the application of defendant, to enter a judgment for defendant’s costs which had accrued at the date plaintiff filed his *praecipe* for dismissal.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment is reversed. The conclusion there reached, after further examination of Section 1004 of the Code of Civil Procedure in the light of the history, and the construction given a like provision by the Supreme Court of California, renders it necessary to overrule the case of *State ex rel. Cornue v. Lindsay*, 24 Mont. 352, 61 Pac. 883, on the point here involved. This is accordingly done.

McNINCH, RESPONDENT, v. CRAWFORD ET AL., DEFENDANTS; COOK ET AL., APPELLANTS.

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(No. 1,853.)

(Submitted April 18, 1904. Decided May 4, 1904.)

Water Rights—Actions—Parties—New Trial—Grounds—Notice of Intention.

1. In an action under Civil Code, Section 1891, to settle the relative priorities and rights of the parties to the use of the waters of a stream, every party to the suit is an antagonist of every other party.
2. Under a notice of intention to move for a new trial, specifying as grounds the insufficiency of the evidence to justify the decision of the court as regarded plaintiff, the appealing defendant could not urge an objection to the sufficiency of the evidence to sustain the decision in favor of another defendant.

Appeal from District Court, Beaverhead County; M. H. Parker, Judge.

ACTION, under Civil Code, Section 1891, by Clark McNinch (substituted for Mattie Z Farrington), against C. E. Crawford, Mary McKnight, M. J. Martinell, M. Dowling and Stephen Cook. From the decree rendered, and from an order denying a new trial, defendants Dowling and Cook appeal. Affirmed.

Mr. W. S. Barbour, Mr. W. Y. Pemberton, and Mr. H. L. Maury, for Appellant Stephen Cook.

Mr. Robert B. Smith, and Mr. Edward C. Smith, for Respondent Clark McNinch.

Mr. Edwin Norris, for Respondent Mary McKnight.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was commenced in the district court of Beaverhead county by Mattie Z. Farrington against several defendants

to have determined the relative rights of the parties to the use of the waters of Sage creek. The answering defendants appeared and filed separate answers and cross-complaints controverting the allegations of the plaintiff's complaint, and every one setting forth his right, and putting in issue the allegations of every other cross-complaint. The cause was tried without a jury. The court made findings of fact and conclusions of law, and entered a decree in accordance therewith. Before the trial, Clark McNinch succeeded to the rights of the plaintiff, and was substituted for her. The court determined the dates and amounts of the appropriations made by the several parties. To the plaintiff was decreed the right to the use of 100 inches of water appropriated October 3, 1883, and to defendant Mary McKnight 250 inches appropriated June 1, 1885. Two of the defendants, Cook and Dowling, made a motion for new trial; and from the order overruling this motion, and from the decree entered, they appealed.

In their notice of intention to move for a new trial, the appellants specify the following grounds: (1) Accident and surprise which ordinary prudence could not have guarded against; (2) newly discovered evidence; (3) insufficiency of the evidence to justify the decision of the court, in this: that the testimony given on the trial shows that the plaintiff has no reasonable use for the waters of Sage creek, that his right had been abandoned, and that it is barred by operation of law; and (4) that the decision of the court is against law.

Appellant Dowling appears to have abandoned his appeal. At least, he has made no appearance in this court.

In his brief filed herein, appellant Cook waives all grounds of the motion for new trial except the ground of the insufficiency of the evidence to sustain the decision of the court as to the rights of plaintiff and defendant Mary McKnight. An examination of the notice of intention to move for a new trial, above, discloses that no objection is made to the decision of the court awarding defendant Mary McKnight her water right on the

ground of the insufficiency of the evidence to support it. That objection is lodged against the decision of the court making an award to the plaintiff McNinch only.

Every party to this suit was an antagonist of every other party, and while a ground of notice of intention to move for a new trial, specifying generally insufficiency of the evidence to support the decision of the court, would doubtless have been sufficient to enable the appellant to urge that objection as to any or all of the court's findings, if otherwise properly presented, yet appellant saw fit to limit that objection to the decision of the court affecting the plaintiff only; and he must now be bound by that notice, and cannot, in the specification of errors in his statement on motion for a new trial or in his brief, insist on any ground of the motion not comprehended within this notice of intention to move for a new trial. Under this notice of intention, then, we are of the opinion that appellant cannot now be heard to urge the objection of insufficiency of the evidence to sustain the decision of the court made in favor of defendant Mary McKnight, and, as all other grounds of the motion are waived, that portion of the court's decision is before us unchallenged.

It is urged that the evidence is insufficient to support the decision of the court in so far as it affects the rights of the plaintiff McNinch. We have examined the record, and are of the opinion that there is sufficient evidence to sustain the court in its decision in this behalf.

The judgment and order are affirmed.

Affirmed.

CITY OF PHILIPSBURG, APPELLANT, v. DEGENHART
ET AL., RESPONDENTS.

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(No. 1,854.)

(Submitted April 18, 1904. Decided May 5, 1904.)

Municipal Corporations — Officers — Bonds — Conditions —

Money Received by City Treasurer—Illegality of Collection—Failure to Account—Liability of Sureties—Actions—Evidence—Reports of Treasurer.

1. The official bond of a city treasurer, as contemplated by the Political Code, is within the purview of Article IX thereof, and must be conditioned in accordance with Section 1057.
2. A city treasurer receipted for moneys collected by officers and agents of the city from gambling houses and brothels, and also included such receipts in his monthly reports to the council. *Held*, that the money so received was received by the treasurer by virtue of his office, and his failure to pay over the money to his successor in office was a breach of his official bond, for which his sureties were liable, though the money was collected illegally and without authority.
3. Reports of a city treasurer to the city council of moneys received and disbursed during the month, which he is required to make by Political Code, Section 4788, may be given in evidence against the sureties on his official bond, and are *prima facie* true, and, when not contradicted by the sureties, are binding on them.

Appeal from District Court, Granite County; Welling Napton, Judge.

ACTION by the city of Philipsburg against L. C. Degenhart and others. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. Reversed.

Mr. Wingfield L. Brown, and Mr. W. E. Moore, for Appellant.

Messrs. McConnell & McConnell, and Mr. D. M. Durfee, for Respondents.

Only moneys that come to the city or town from taxation or other legal sources is the city treasurer bound to receive, and only such moneys as he does receive from these legal sources are the sureties bound to see that he accounts for. (Political Code, Sec. 4788, Subd. 1; Century Digest, Vol. 8, Sec. 38, column 49; 24 Am. & Eng. Ency. of Law, 879; *Mason v. Commissioners*, 104 Ga. 35; *State v. Bonner*, 72 Mo. 387; *U. S. v. Morgan*, 23 Fed. 48; *U. S. v. Adams*, 24th Fed. 348; *U. S. v. White*, 4th Wash. (U. S.) 414; *People v. Pennock*, 60 N. Y. 421; *Ward v. Stahl*, 81 N. Y. 406; *State v. Rollins*, 29 Mo. 267; *San Jose*

v. *Welch*, 65 Cal. 358; *People v. Lucas*, 93 N. Y. 855; *People v. Hilton*, 36 Fed. 172; *Governor v. Perrine*, 23 Ala. 807; *State v. Brown*, 33 N. C. 141; *Commonwealth v. Cole*, 7 B. Monroe (Ky.), 250, 46 Am. Dec. 515; *Eaton v. Kelly*, 72 N. C. 110; *Cornell v. People*, 37 Ill. App. 490; *Gerber v. Ackley*, 32 Wis. 233, 37 Wis. 43; *State v. McDonough*, 9 Mo. App. 63; *Barnes v. Whitaker*, 45 Wis. 204; *City of Lowell v. Parker*, 43 Am. Dec. 437; *Lammon v. Fusier*, 111 U. S. 17; 2 Am. & Eng. Ency. of Law, p. 466; McLain on Criminal Law, Sec. 648; *State v. Newton*, 26 Ohio St. 265.)

MR. COMMISSIONER CLAYBERG prepared the following opinion for the court.

This is an appeal from a judgment and order overruling a motion for a new trial. The action was brought by the city against the sureties upon the official bond of Charles A. Wallender, treasurer of the city of Philipsburg, to recover for a deficiency in his account as such city treasurer. The court found that "the shortage of C. W. Wallender, defendant, is the sum of \$1,284.21." Nevertheless judgment was entered for defendants. The official bond sued upon is attached to the complaint on file, and is conditioned as follows: "Now, therefore, if the said Charles A. Wallender shall well, truly and faithfully perform all official duties now required of him by law, and also such additional duties as may be imposed upon him by any law of the state, and if he shall account for and pay over and deliver to the person or officer entitled to receive the same, all moneys or other property that may come into his hands as such city treasurer, then this obligation to be void and of no effect; otherwise to remain in full force and virtue."

The defense set up in the answer was, briefly, that the officers and agents of the city collected money from various gambling houses and houses of prostitution, which they had no right to collect, and therefore the city had no right to the money received therefrom, and that the conversion and embezzlement of the

moneys alleged in the complaint "was only the conversion of money not belonging to the city of Philipsburg, but received by the illegal means above set forth." The court found that the moneys thus collected by the city officials amounted to the sum of \$1,072.53.

The condition of the bond is substantially within the provisions of Section 1057 of the Political Code, as amended (Laws of 1899, p. 79). Under the terms of this bond, the city treasurer and his sureties were liable for all moneys that came into his hands as such city treasurer which he did not pay over "to the person or officer entitled to receive the same." The record discloses the election of his successor in office, his demand on Wallender for the money, and his failure to pay over the sum for which suit is brought.

Counsel for respondent seems to be of the impression, as shown by his brief, and authorities cited therein, that the statutory bond of a city treasurer can be conditioned only that he faithfully perform the duties of his office. We gather this from the citation of Subdivision 1 of Section 4788 of the Political Code, and of cases which uniformly hold that, where a bond is given for the performance of the duties of an office only, its language cannot be extended. In some way counsel seems to have overlooked the fact that we have a statute entitled "Bonds of Officers" (Article IX, Sec. 1050 *et seq.*, Political Code). This Article contemplates all official bonds. That it is intended to include official bonds of city treasurers seems apparent from Section 1075, which provides: "Any surety on the official bond of a city, town, township, county or state officer, may be relieved from liabilities thereon afterwards accruing, by complying with the provisions of the three sections following."

We have searched our statutes diligently, but, aside from the provisions of this Article, we find none prescribing what shall be the condition of an official bond of a city treasurer. All legislation seems to have been enacted upon the theory that this Article covers such bonds; for instance, Section 4761 of the Political Code makes it the duty of the city council to provide

accountability of all officers "by requiring from them sufficient security for the faithful performance of their duties," but does not prescribe what the conditions of the bond shall be. Section 4762 of the Political Code provides that "the city treasurer * * and such other city officers as the council by ordinance may require, must give official bonds in such sums and securities as the ordinance may prescribe." Section 4758 of the Political Code provides that "each officer of a city or town must take the oath of office, and such as may be required to give bonds, file the same, duly approved, within ten days after receiving notice of his election or appointment." Section 4788 of the Political Code prescribes certain statutory duties of a city treasurer.

A duty devolves upon all officials to turn over and account for all moneys in their hands, which they have received in their official capacity, to their successor in office. This duty is so plain that it needs no statutory affirmance. If an officer receives money by virtue of his office, and as such official, such money, so far as the officer is concerned, belongs to the municipality of which he is an officer, and not to him. His duties as to money received by him as treasurer are exactly the same as his duties regarding the office furniture and supplies in his office. That this duty exists and is recognized by the legislature is apparent from the provisions of Section 1057, *supra*, which prescribes the conditions of all official bonds: "The condition of an official bond must be that the principal will well, truly and faithfully perform all official duties then required of him by law, and also all such additional duties as may be imposed on him by any law of the state, and that he will account for and pay over and deliver to the person or officer entitled to receive the same, all moneys or other property that may come into his hands as such officer. Such bond must be signed by the principal and at least two sureties." This section was amended by the Laws of 1899, p. 79, by inserting after the word "state" the words "subsequently enacted."

We therefore have no hesitancy in saying that the official bond of a city treasurer, as contemplated by the Political Code, comes

clearly within the purview of Article IX, *supra*, and must be conditioned in accordance with Section 1057.

Article III, in which Section 4788 is found, is entitled "Executive Powers," and does not assume to say anything about official bonds, but prescribes certain duties of officials of a city. That other duties may exist is apparent from Section 4740 of the Political Code.

The only question, therefore, involved in this case, as to the liability of the sureties, is whether or not the city treasurer received the money for which suit is brought in his official capacity. Section 4788 of the Political Code provides that it is the duty of the treasurer, among other things (Subdivision 3): "To present on the first Monday of each month to the council a full and detailed statement of the amounts of money belonging to the city or town received by him, and by him disbursed, during the preceding month, and the state of each particular fund, which statement must be verified by his oath." Subdivision 6 provides: "To give every person paying to him money as treasurer, a receipt therefor, specifying the date of payment, the amount, and for what paid." The record discloses the receipts of the treasurer for the moneys sought to be recovered, as required by Subdivision 6, *supra*, thus showing that he received this money as city treasurer. The record also discloses the monthly reports of the treasurer, properly verified by him, stating that he held this money as city treasurer. These reports comply with the requirements of Subdivision 3, *supra*.

Under all the testimony introduced at the trial, and the finding of the court, it is conclusive that the money for which the suit was brought was received by the city treasurer by virtue of his office, and not otherwise. The sureties on the official bond, who are defendants in this case, have not sought to contradict any of these receipts or reports, and they are therefore bound thereby.

Reports of an officer which are required by law may be given in evidence against the sureties on his official bond, and are *prima facie* true. (*Board of Supervisors v. Bristol*, 99 N. Y.

316, 1 N. E. 878; *State v. Smith*, 26 Mo. 226, 72 Am. Dec. 204; *Van Sickel v. County of Buffalo*, 13 Neb. 103, 13 N. W. 19, 42 Am. Rep. 753; *Bissell v. Saxton*, 66 N. Y. 55; *Broad v. City of Paris*, 66 Tex. 119, 18 S. W. 342; *Mahon v. Kinney County* (Tex. Civ. App.), 28 S. W. 1024; Mechem on Public Officers, Sec. 289.)

We agree with the position taken by counsel for appellant that Wallender, the city treasurer, having received and receipted for all the moneys in question *as city treasurer*, and having acknowledged the receipt and the holding of said money *as moneys of the city*, by his monthly reports and accounts to the city, his failure to pay over such moneys to his successor in office is a breach of the condition of his bond, and that the sureties thereon are liable therefor.

The conduct of the city officials in the collection of this money is reprehensible, and should not be upheld. By the method recognized and practiced in the city of Philipsburg, the statutes of the state of Montana were allowed to be constantly violated. There is no showing in the record but that the money thus collected was paid voluntarily, and therefore could not be recovered from the city by the parties paying the same. Although illegally collected, it was therefore the money of the city of Philipsburg. It was paid to the treasurer, and he embezzled or converted the same. The sureties on his official bond contracted with the city against such conduct of the treasurer. It does not lie in their mouths to say that the money was paid illegally and therefore does not belong to the city, or that it was so tainted with corruption that it would be violative of public policy to allow the recovery against the treasurer's bond. The mere fact that the money was collected without authority can make no difference in the liability of the sureties upon the bond here involved. This question has been practically decided in the cases of *Smith v. Lovell*, 2 Mont. 332, and *Commissioners of Meagher County v. Gardner*, 18 Mont. 110, 44 Pac. 407.

Mechem on Public Officers, Section 295, uses the following language: "An officer who has received money for and on ac-

count of his principal cannot, in general, when called upon to pay it over, defend on the ground that it was money which his principal had no right to obtain, procure or receive. It is held that his sureties are equally estopped." See, also, *Sutherland v. Carr*, 85 N. Y. 105; *Wylie v. Gallagher*, 46 Pa. St. 205; *Boehmer v. Schuylkill County*, 46 Pa. St. 452; *Heppe v. Johnson*, 73 Cal. 265, 14 Pac. 833; *Detroit Savings Bank v. Ziegler*, 49 Mich. 157, 13 N. W. 496, 43 Am. St. Rep. 456; *Galbraith v. Gaines*, 10 Lea, 568.

We advise that the judgment and order appealed from be reversed, and the case remanded, with instructions to the court below to render judgment in favor of appellant against the defendants for the sum of \$1,284.21.

• PER CURIAM.—For the reasons stated in the foregoing opinion the judgment and order appealed from are reversed, and the case is remanded, with instructions to the court below to render judgment in favor of appellant against the defendants for the sum of \$1,284.21.

MR. JUSTICE MILBURN: I concur. It might be inferred, from the statement that "there is no showing in the record but that the money thus collected was paid voluntarily," that money paid by inmates of houses of ill fame and other violators of the law to city officials in order to prevent prosecution is sometimes paid voluntarily.

I do not believe that such payments, exacted from law-breakers by officers who thus become themselves *participes criminis*, ever are or ever can be voluntarily made.

LONGTIN, RESPONDENT, v. PERSELL ET AL., APPELLANTS.

(No. 1,880.)

(Submitted April 23, 1904. Decided May 5, 1904.)

Nuisance—Blasting—Injuries — Liability—Exercise of Care.

The carrying on of blasting on premises platted as city lots, continuously for over a year, constitutes a nuisance *prima facie*, irrespective of the care exercised, and a recovery may be had for injury to property owing to concussions of the air from blasting.

Appeal from District Court, Lewis and Clarke County; J. M. Clements, Judge.

• ACTION by Joseph Longtin against Thomas B. Persell and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

STATEMENT OF THE CASE.

This action was commenced by Joseph Longtin, plaintiff, against Thomas B. Persell and W. E. Persell, copartners doing business as the Persell Limestone Company. The plaintiff owns, is possessed of, has his residence and lives on, lot 13, block 553, original townsite of Helena. The defendants own and are operating a limestone quarry on portions of blocks 554 and 556 of the original townsite of Helena, and within the present corporate limits of the city of Helena. The complaint alleges that, for twelve months prior to the commencement of this action, defendants, in the conduct of their operations in said quarry, had used and exploded large quantities of powder in blasting out stone, and that, by means of such blasting, fragments of rock had been hurled with great force against plaintiff's dwelling house, doing damage thereto; that pieces of rock had been thrown upon his premises; and that the explosion of such blasts of powder had caused concussions of the air to such an extent as to shake his dwelling house, and to cause rents to be made in the walls, rendering the dwelling unsafe for residence purposes, and doing damage to it to the extent of \$1,000. The answer denies that defendants caused any damage whatever to plaintiff's property, or that any damage had been sustained by plaintiff. The cause was tried to a jury, which returned a verdict in favor of the plaintiff; and from the judgment entered thereon, and from the order denying them a new trial, defendants appealed.

Messrs. Toole & Bach, and Mr. M. S. Gunn, for Appellants.

Messrs. Nolan & Loeb, for Respondent.

MR. JUSTICE HOLLOWAY, after stating the case, delivered the opinion of the court.

Numerous errors are assigned, but it is conceded that they all raise but one question. Appellants contend that they are not liable for damages caused to respondent's premises by reason of the vibrations of the earth or concussions of the air resulting from the blasting done by them, where no negligence is alleged or proved, and, in support of this contention, rely upon the decisions in the following cases: *Benner v. Atlantic Dredge Co.*, 134 N. Y. 156, 31 N. E. 328, 17 L. R. A. 220, 30 Am. St. Rep. 649; *Booth v. Rome, etc. Railroad Co.*, 140 N. Y. 267, 35 N. E. 592, 24 L. R. A. 105, 37 Am. St. Rep. 552; *Simon v. Henry*, 62 N. J. Law, 486, 41 Atl. 692; and *Sullivan v. Dunham*, 161 N. Y. 290, 55 N. E. 923, 47 L. R. A. 715, 76 Am. St. Rep. 274.

Benner v. Atlantic Dredge Company was an action by a property owner against the dredge company which had a contract with the government of the United States to remove an obstruction to navigation from East river, New York. In the performance of its work the dredge company used explosives, by reason of which plaintiff's building was injured. The court held that the defendant was not liable in the absence of a showing of negligence, but based its decision upon the ground that the general government had absolute power to make or have made the improvement mentioned, and could not be held liable for damage resulting therefrom, and that the defendant had all the authority which the government had to select the means necessary to be employed. The court said: "The defendant had the authority of the government, and kept within it, and therefore is not liable."

Booth v. Railroad Company was an action by a property owner against the railroad company to recover damages for in-

juries caused by the explosion of blasting powder. It appeared that it was necessary for the company to do the blasting in order to make necessary excavations for its track. In the opinion of the court, emphasis is laid upon the fact that this blasting was only a temporary expedient, necessary to reduce the property to the use for which it was intended, and the court makes a distinction between a case of that kind and one where the blasting is carried on continuously.

Simon v. Henry was an action by a property owner against certain defendants who had a contract with the municipal authorities of the town of Union, N. J., to construct a public sewer for the town. In making excavations in the street, the defendants employed blasting powder. The plaintiff's property was injured because of concussions of the air consequent upon the explosions of such powder. The decision of this case is made upon the authority of *Booth v. Railroad Co.*, *supra*, and with reference to that case it is said: "In *Booth v. Rome, etc. Railroad Co.* * * * it was held that the temporary use of explosives in the blasting of rock, provided reasonable care be exercised, is lawful, and damage resulting from concussion thereby produced is *damnum absque injuria*."

Sullivan v. Dunham was an action by an administratrix to recover damages for the unlawful killing of her intestate. Certain parties were employed by defendant Dunham to remove trees growing on his land near a public highway. The employes used dynamite in their operations, and, as a result of an explosion under a tree, a portion of the stump thrown into the public highway, along which plaintiff's intestate was traveling, killed her. It was conceded that defendants were on their own land, engaged in a lawful occupation, and no negligence was charged against them, but they were held liable. On principle, this case would seem to be opposed to appellants' contention, rather than support it. However, in the body of the opinion this language is used: "When the injury is not direct, but consequential, such as is caused by concussion, which, by shaking the earth, injures property, there is no liability, in the ab-

sence of negligence;" citing *Benner v. Atlantic Dredge Co.*, above. This seems to be purely *dictum*. The question of damages caused by concussions of the air or vibrations of the earth was not before the court. The cause of the injury was a portion of a tree thrown by force of the explosion of dynamite against the person killed. Neither is the doctrine announced supported by the authority cited, for, as we have already seen, the case of *Benner v. Atlantic Dredge Co.* was decided upon a wholly different ground.

We are not prepared, then, to agree with counsel for appellants that the courts of New York and New Jersey have announced the doctrine that for injuries sustained by the property of one, by concussions of the air caused by blasting on the property of another, no damages can be recovered in the absence of negligence on the part of the party causing the injury.

The Court of Appeals of New York has held that damages resulting from explosions of powder, which cast fragments of rock onto the property of another, can be recovered, even though no negligence be alleged or proved. (*Hay v. Cohoes Co.*, 2 N. Y. 159, 51 Am. Dec. 279; *St. Peter v. Denison*, 58 N. Y. 416, 17 Am. Rep. 258.) And the Supreme Court of New Jersey has held that in a case where defendant stored a large quantity of blasting powder within the city limits of Jersey City, which by accident exploded, causing injury to plaintiff's property, defendant was liable, in the absence of any showing of negligence (*McAndrews v. Collerd*, 42 N. J. Law, 189, 36 Am. Rep. 508.) We can perceive no reason for recovery in these latter cases which is not equally cogent in the one at bar, but, even if these courts should hereafter follow the rule contended for by appellants, we are not disposed to do so, for it appears contrary to reason and the great weight of authority.

In *City of Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408, the city owned a stone quarry on property adjoining plaintiff's property, and employed one Ardner to quarry and break stone for use upon the streets of the city. In his operations the employe used blasting powder, and, as a result of one

blast, fire was communicated to plaintiff's buildings, which were damaged thereby. The city was held liable, and the court said: "As between the owners of adjacent lands, the maxim of the common law, *Sic utere tuo ut alienum non laedas*, applies with special force, not because it forbids the exercise of the right of dominion or control of property, according to the pleasure of the owner, in one case more than in another, whether it be real or personal property, or whether it be owned for special or general uses, but because the right to use or control it according to the pleasure of the owner is limited under some circumstances more than under others. Undoubtedly the right to use property as the owner may please, provided that reasonable care is taken not to do unnecessary injury to others, is the ordinary rule. But this rule cannot be interposed to justify the committing of a trespass or the maintaining of a nuisance."

In *Bradford Glycerine Co. v. St. Mary's Woolen Manufacturing Co.*, 60 Ohio St. 560, 54 N. E. 528, 45 L. R. A. 658, 71 Am. St. Rep. 740, the defendant owned and operated a nitroglycerin plant. A certain quantity of this material, stored in a magazine, exploded, causing damage to plaintiff's property. The defendant contended, as appellants contend in this case, that it was not liable, for the reason that the damage was not caused by fragments of rock or other material being hurled against plaintiff's building or onto his property, but by violent atmospheric vibrations caused by the explosion. The defendant, however, was held liable in the absence of any showing of negligence; the court basing its opinion, apparently, upon the case of *Tiffin v. McCormack*, above, and *Fletcher v. Rylands*, L. R. 3 H. L. 330, where emphasis is laid upon the fact that the use made by the defendant of its premises was an extraordinary or unusual one, and constituted a nuisance.

In *McKeon v. See*, 51 N. Y. 300, 10 Am. Rep. 659, the defendant operated marble works on property adjacent to plaintiff's property. The defendant used steam power in operating a machine for cutting stone, and the jarring of plaintiff's building, caused by the operation of this machinery, damaged the

building, for which the defendant was held liable, though no negligence on his part was alleged or proved. The court reviewed the authorities at length, and held that the maxim, "*Sic utere tuo ut alienum non laedas*," applies in a case of this kind. It does seem that the same reason which justifies recovery in an action of this character would likewise justify recovery in the case at bar.

In *Fitzsimons v. Braun*, 199 Ill. 390, 65 N. E. 249, 59 L. R. A. 421, the defendants were contractors of the city of Chicago, engaged to make excavations for water mains. It was necessary to use blasting powder in the prosecution of their work. The blasts caused concussions of the air and vibrations of the earth's surface to such an extent as to injure plaintiff's building. The defendants claimed that they did the work with due care, and were not guilty of any negligence whatever, particularly as there was no actual invasion of plaintiff's property by fragments of earth or rock thrown upon it. But the court held them liable for the injuries sustained, and, among other things, said: "If one who, for his own purposes and profit, undertakes to perform a work, by means of explosives, inherently dangerous to the property of another, should be held liable for an injury occasioned by any substance cast by the explosives on the property of such other, it is only by the merest subtlety of reasoning he should be held not liable to respond for equal or greater damage caused by the concussion of the air or of the earth. There is no ground of substantial or practical distinction. The case of *Bradford Glycerine Co. v. St. Mary's Woolen Mfg. Co.*, *supra*, may be regarded as authority for the view that liability in such cases is not restricted to an actual invasion of the property, but damages for consequential injuries may be recovered."

Colton v. Onderdock, 69 Cal. 155, 10 Pac. 395, 58 Am. Rep. 556, is a case the facts of which are practically identical with those in the case now under consideration. The defendant relied upon the proposition that, as he had performed his work in a careful and prudent manner, he could not be held liable.

But the court held otherwise, and, in disposing of his contention, said: "The fact that the defendant used quantities of gunpowder—a violent and dangerous explosive—to blast out rocks upon his own lot, contiguous to another person's, situate in a large city, must be taken as an unreasonable, unusual and unnatural use of his own property, which no care or skill in so doing can excuse him from being responsible to the plaintiff for the damages he actually did to her dwelling house, as the natural and proximate result of his blasting. For an act which in many cases is in itself lawful becomes unlawful when by it damage has accrued to the property of another. And it would make no material difference whether that damage, resulting proximately and naturally from the act of blasting by the defendant, was caused by rocks thrown against Mrs. Colton's dwelling house, or a concussion of the air around it, which had either damaged or entirely destroyed it. The defendant seems by his contention to claim that he had a right to blast rocks with gunpowder on his own lot in San Francisco, even if he had shaken Mrs. Colton's house to ruins, provided he used care and skill in so doing, and although he ought to have known that by such act, which was intrinsically dangerous, the damage would be a necessary, probable or natural consequence. But in this he is mistaken."

If the damage to plaintiff's property had been caused by fragments of rock thrown upon his property or against his dwelling house by the blasting which defendants were doing, the authorities are practically unanimous in holding that the defendants would be liable, even though they exercised reasonable care in their operations. (Cooley on Torts, 332.) We can see no reason whatever for adopting that view, and at the same time holding that they are not liable for damages occasioned by the vibrations of the ground or the concussion of the air. The agency employed in either case is the same, and the danger as imminent in one instance as in the other.

It is to be observed that the defendants here were operating upon lots platted for city purposes, and that their operations

were continuous over a period of at least one year. The liability arises from the unusual or extraordinary use to which appellants put their property, the fact that their operations were continuous, and that in these operations they used explosives in such quantities as to cause injury to plaintiff's property. These facts are at least *prima facie* evidence that appellants were maintaining a nuisance, and they cannot justify by showing that in maintaining such nuisance they exercised due care.

So far as this record discloses, plaintiff was entitled to the quiet and peaceable possession and enjoyment of his property, and could properly invoke, as against these appellants, the rule of the common law quoted above.

The judgment and order are affirmed.

Affirmed.

BUTTE MINING & MILLING COMPANY, APPELLANT,
v. KENYON ET AL., RESPONDENTS.

(No. 1,866.)

(Submitted April 21, 1904. Decided May 6, 1904.)

Appeal—Record on Appeal—Conflicting Evidence — Instructions—Judgment Roll — Brief — References to Record—Rules of the Supreme Court.

1. The evidence being conflicting, its sufficiency to sustain the verdict or judgment will not be considered on appeal.
2. The instructions, which are a part of the judgment roll, not appearing therein, as it is certified, but being merely in the statement on motion for a new trial, cannot be considered.
3. Assignments of error upon the admission or rejection of testimony, not presented in appellant's brief in accordance with the requirements of the Rules of the Supreme Court, will not be considered by the court.

ON MOTION FOR REHEARING.

1. Where there is a substantial conflict in the evidence, the supreme court, on appeal, will not reverse the judgment of the lower court on the ground of alleged insufficiency of the evidence.

30	314
30	392
30	409
30	314
31	12

30	314
39	378

2. The statutory steps necessary to perfect an appeal are jurisdictional, unless they are taken as provided by the statute, the supreme court has no power to consider the case.
3. Though the preparation of the record to present to the supreme court is not a jurisdictional matter, nevertheless a substantial compliance with the statute in this respect is necessary to present alleged errors for review, hence where instructions on appeal do not appear in the judgment roll, but merely in the statement on motion for a new trial, they cannot be considered.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

ACTION by the Butte Mining & Milling Company against W. R. Kenyon and others. Judgment for defendants. From the judgment, and from an order overruling plaintiff's motion for a new trial, plaintiff appeals. Affirmed.

Messrs. McBride & McBride, for Appellant.

"In every lease there is, unless excluded by the operation of some express covenant or agreement, an implied obligation on the part of the lessee to so use the property as not unnecessarily to injure it, or, as it is stated by Mr. Comyn, 'to treat the premises demised in such manner that no injury be done to the inheritance, but that the estate may revert to the lessor undeteriorated by the wilful or negligent conduct of the lessee.' (Com. Land. & Ten. 188.) This implied obligation is part of the contract itself, as much so as if incorporated into it by express language. It results from the relation of landlord and tenant between the parties which the contract creates. (*Holford v. Dunnett*, 7 M. & W. 352.) It is not a covenant to repair generally, but to so use the property as to avoid the necessity for repairs as far as possible. (*Horsefall v. Mather*, 7 Holt, 9; *Brown v. Crump*, 1 Marsh, 569.") (*United States v. Bostwick*, 94 U. S. 65.) The above case is cited and relied upon in *Carlin v. Ritter*, 68 Md. 482, 6 Am. St. Rep. 469, 13 Atl. 372, holding removal of fixtures constitutes waste. In *Chalmers v. Smith*, 152 Mass. 564, 26 N. E. 96, 11 L. R. A. 771, holding tenant liable for damage to barn caused by care-

less stowage. In *Warder v. Henry*, 117 Mo. 545, 23 S. W. 780, holding carelessly allowing stock to destroy fruit trees is waste. In *Powell v. Dayton, etc. R. R.*, 16 Ore. 36, 41, 8 Am. St. Rep. 254, 259, 16 Pac. 864, 867, holding fact that tenant holds with privilege of purchasing does not affect liability. Upon this subject see, also: *Newbold v. Brown*, 41 N. J. Law, 266; *Stevens v. Pantling*, 49 N. W. Rep. 607, S. C. 87 Mich. 476; *Setvens v. Pantling*, 54 N. W. Rep. 716, S. C. 95 Mich. 145; *Wilcox v. Cate*, 26 Atl. 1105, S. C. 65 Vt. 478.

There is no more familiar principle in the law of evidence than that the opinion of witnesses is generally irrelevant. *Omni sacramentum esse certae scientiae*. (Jones on Evidence, Secs. 361, 5; *Duer v. Allen*, 64 N. W. 683, S. C. 96 Iowa, 36; *Ross v. B. & W. Ry. Co.*, 88 Mass. 92.)

Instruction No. 8 is incorrect for the reason that it is not the law, it being the law of Montana that plaintiff in such a case would be entitled to recover as against the defendants who had entered into the contract of lease set out in the complaint. The instruction, perhaps, accords with the law as it was before it was changed by statute. The statute in force at the time of the making of the lease was Section 1296, appearing on page 1006 of the Compiled Statutes of Montana, and is as follows: "All joint obligations and covenants shall hereafter be taken and held to be joint and several obligations and covenants." The same section was continued in force by the Code, and constitutes Section 1941 of the Civil Code of Montana. The law as it now exists is announced in the case of *Sabin v. Michell*, 39 Pac. 635, S. C. 27 Ore. 66.

Mr. Charles R. Leonard, and *Mr. L. J. Hamilton*, for Respondents.

The decisions of this court on appeals involving the consideration by this court of questions of evidence are very clear to the effect that where there is a substantial conflict in the evidence the decision of the court below will not be disturbed, and we cite on this point the following decisions: *Sweeney v. City*

of *Butte*, 15 Mont. 274; *Murray v. Heinze*, 17 Mont. 333; *Patten v. Hyde*, 23 Mont. 23; *Nyhart v. Pennington*, 20 Mont. 158; *Ray et al. v. Cowan*, 18 Mont. 259; *Harrington v. B. & B. Co. et al.*, 19 Mont. 411; *Baxter v. Hamilton*, 20 Mont. 327; *State v. Foster*, 26 Mont. 71; *Hamilton v. Nelson*, 22 Mont. 539; *Schatzlein Paint Co. v. Passmore*, 26 Mont. 500.

MR. COMMISSIONER CLAYBERG prepared the following opinion for the court:

STATEMENT.

Appeal from judgment in favor of defendants, and order overruling plaintiff's motion for a new trial.

On and prior to May 8, 1894, the plaintiff was the owner and in possession of a certain quartz mill and machinery. On this day defendants went into possession under an agreement with plaintiff for the use thereof upon a stipulated rent. After the defendants had been in possession for some months, and on the 28th day of September, 1894, the mill was destroyed by fire.

Plaintiff brings this suit for the purpose of recovering the value of the mill, and states his cause of action in two separate counts. In the first count he alleges that defendants did willfully and recklessly place a damper in the smokestack connected with the fire box and combustion chamber, and did willfully and recklessly close such damper, which had the effect of forcing the fire products through cracks in the lining of the fire box and combustion chamber, and setting fire to the mill. The second count is based upon the alleged provisions of an oral lease, that defendants should return the mill in good condition and repair at the end of the term, and that through their negligence (alleged practically in the same manner as the negligence alleged in the first count) the mill was destroyed, causing a breach of the covenant of the lease, which rendered the defendants liable for the value of the mill.

INSUFFICIENCY OF THE EVIDENCE.

We have carefully examined the record in this case, and, after such examination, are convinced that testimony was offered by defendants tending to contradict all the allegations of the complaint in regard to the negligence alleged in the first count, and in regard to the terms of the lease alleged in the second count thereof. The evidence in the case is very conflicting, and it would serve no useful purpose to enter into a discussion of it in this opinion. The rule of law in this jurisdiction is well settled, that where the evidence is conflicting this court will not consider the question of its insufficiency to sustain the verdict or judgment. (*Nelson v. Great Northern Ry. Co.*, 28 Mont. 297, 72 Pac. 642; *Hefferlin v. Karlman*, 29 Mont. 139, 74 Pac. 201.)

ERRORS IN INSTRUCTIONS.

Counsel for appellant assigns error to the giving of certain instructions requested by respondents. These errors cannot be considered, for the reason that the instructions excepted to are not before us. Instructions are a part of the judgment roll. (Section 1196, Code of Civil Procedure.) The judgment roll must be certified to this court as an entirety. (*Featherman v. Granite County*, 28 Mont. 462, 72 Pac. 972.) These instructions do not appear in the judgment roll as certified to this court, but in the statement on motion for a new trial. This is insufficient. (*Featherman Case, supra.*)

The clerk of the court below, in his original authentication of the record, did not certify that it contained copies of the instructions. After the hearing of the case, counsel presented an amended certificate of the clerk, and asked that it be attached to the transcript on file. By this amended certificate the clerk certifies that the transcript contains "a true, correct and complete transcript" of certain papers (naming them), and then continues, "with instructions given in said cause, and contains all the papers which constitute and are included in the judgment roll in said action."

Aside from the sufficiency of this paper as a certificate under the provisions of our statute, which we do not find necessary to decide, and aside from the question whether or not it is presented to this court in such a manner as to be received, of which we have very serious doubt, but which we do not decide, this amended certificate does not in any way or manner aid the transcript in the defect above mentioned.

ERRORS IN THE ADMISSION AND REJECTION OF TESTIMONY.

Paragraph "c," Subd. 3, Rule X, of this court provides that the brief shall contain "a brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the page of the record, and the authorities relied upon in the support of each point." Appellant's brief contains fifty-two specifications of error, all of which are commented upon in the argument. The argument covers twenty-nine pages of the printed brief, and in only two instances is there any reference made to the page of the record, and these references are upon alleged errors which are immaterial. The record consists of 171 pages of printed matter. This court will not spend the time searching the record for errors when no reference is made thereto as provided by its rules.

Therefore the assignments of error upon the admission or rejection of testimony are not presented to this court, within the purview of the rule above announced, and will not be considered by the court.

We advise that the judgment and order appealed from be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order are affirmed.

ON MOTION FOR REHEARING.

(Decided June 13, 1904.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

1. Appellant has submitted a motion for rehearing herein, in which complaint is made that certain facts appearing in the record were not given due weight in determining the question of the sufficiency of the evidence to sustain the verdict. The criticism of the commissioners' opinion seems to be founded upon the presumption that, as these facts are not set forth particularly in the statement of the case, they were overlooked by the commissioners and by the court. This was not the case. There is a substantial conflict in the evidence. This being so, this court had to accept the opinion of the district court thereon, and refuse to reverse the judgment on the ground of alleged insufficiency of the evidence. This court does not usually in such cases undertake in its opinion to set forth an analysis of the evidence for the purpose of pointing out the conflict, as this course serves only to encumber the reports, and involves a useless expenditure of time and labor.

2. The appellant alleges surprise at the action of the court in refusing to consider the instructions. Counsel say that the court permitted the certificate of the clerk of the district court to be amended at the hearing so as to show that the transcript contains a copy of the judgment roll, and that they would have amended the transcript so as to complete the judgment roll, upon an intimation that it did not contain a complete copy. They also say that they had gained the impression from an intimation by one of the justices that the strict rule of the case of *Featherman v. Granite County*, 28 Mont. 462, 72 Pac. 972, would not hereafter be followed, and that it was followed in this case is alleged as a second distinct ground of surprise.

As to the first allegation of surprise, it is sufficient to say that the court cannot, during a hearing, examine the record to determine which of the questions argued by counsel are properly presented by it. It is no part of the court's duties to do this at that time, as its attention is then absorbed in following counsel through the course of their argument.

Touching the rule laid down in *Featherman v. Granite County*, *supra*, as to how the record should be made up, the

only modification that the court has made of it is stated in the case of *Glavin v. Lane*, 29 Mont. 228, 74 Pac. 406, in which the use of the word "jurisdiction," used in *Featherman v. Granite County*, is criticised and limited in its application in its strictly technical sense to the steps necessary to perfect the appeal. These steps are jurisdictional, and, unless they are taken as provided by the statute, this court has no power to consider the case. The preparation of the record to present to this court is not a jurisdictional matter. Nevertheless the directions of the statute must be substantially pursued, in order to present alleged errors for review. Section 1196, Code of Civil Procedure, directs what the judgment roll shall contain. This section, read in the light of Section 1151 and Section 1080 as amended by the Act of 1897 (Sess. Laws 1897, p. 241), leaves no doubt as to what papers shall be included. Sections 1736 and 1738 are equally clear as to what the record presented to this court on appeal from a judgment or an order denying a new trial should contain, as well as the order in which they should appear. It is not proper to incorporate the judgment roll in the statement or bill of exceptions, and undertake in this way to get it before this court. The statement or bill should not include any of the papers which properly belong to the judgment roll. This is clearly stated in *Featherman v. Granite County*, *supra*. The judgment roll should be certified up as a separate entity. If the record is made up in accordance with the statutory direction, this court can then readily turn to any portion referred to or desired. The question sought to be presented is then presented as the statute requires. A substantial departure from the statutory directions destroys any semblance of uniformity in practice. For one substantial departure is no more important than another, and, if an observance of the provisions of the statute may be omitted in one substantial particular, they may be disregarded altogether, as was frequently the case prior to the decision in *Featherman v. Granite County*, *supra*.

This court has never intended that the profession should understand that a strict, technical compliance with the statute

would be required. So long as a substantial compliance is apparent, this court will proceed to determine all questions properly raised by the record. If, for instance, the record contains the pleadings and a judgment as a separate entity purporting to be the judgment roll, the merits of the case, so far as the judgment roll as made up will permit, will be considered without question whether all the papers are in the roll which the statute requires should be there. To illustrate: If it be sought to have this court review the action of the district court upon a demurrer to the complaint, and the judgment roll contains the demurrer, with the order disposing of it, this court will consider that question, notwithstanding the fact that the instructions may not be incorporated in the judgment roll. In the same way, it will consider the merits of the instructions, if they are found in the judgment roll, notwithstanding demurrers and the orders disposing of them, and like matters, may be omitted. The provisions of the statute direct how and in what form the evidence of what took place in the district court shall be presented to this court, and the sooner counsel learn that these provisions are to be followed as the correct rule of practice, instead of the loose methods which have hitherto prevailed, the better it will be for counsel and litigants. This course will necessarily lessen the labors of this court. In this case what purports to be a copy of the judgment roll is in the record as a separate entity, but no instructions are incorporated therein, and there is no legal evidence before this court that any were in fact given. In the statement, where they should not be, are found what are alleged to be the instructions. They were not considered for this reason. In view of the fact that what may be the judgment roll appears in the transcript in the proper place, we considered the only question which was properly presented.

3. Under a strict application of the rule relative to briefs, the judgment and order should have been affirmed without considering the merits at all. Besides the defects pointed out in the commissioners' opinion, there are others which render the

• brief of no aid in the examination of the somewhat voluminous record, owing to the fact that in its preparation counsel failed to observe the rule, by not pointing out where in the record the matters illustrating the exceptions taken and reserved can be found.

The motion for rehearing is denied.

Denied.

McCABE, APPELLANT, v. MONTANA CENTRAL RAIL-
WAY COMPANY, RESPONDENT.

(No. 1,822.)

(Submitted March 21, 1904. Decided May 6, 1904.)

30	323
31	146
31	449
32	75
32	79

30	328
34	158
34	160
34	194
34	195

30	323
36	165

30	323
41	291

*Master and Servant—Safe Place to Work—Railroad Employes
—Negligence — Contributory Negligence — Assumption of
Risk—Questions for Jury—Trial—Nonsuit—Presumptions
—Directed Verdicts.*

1. It is the duty of an employer to use all reasonable care, considered in relation to the kind of business, to provide a safe place in which the employe may perform his service.
2. A railroad employe engaged in switching is entitled to rely on the presumption that the railroad has properly constructed its line and appliances.
3. On motion for a nonsuit, every fact will be deemed proved which the evidence tends to prove.
4. The fact that a railroad employe went in and out of the yards in which he was employed during a period of three months, and that immediately before the accident he threw switches, was not conclusive on the question of notice to him of the proximity of the switch stand to the track.
5. A railroad is not an insurer of the safety of its employes, but is required only to exercise all reasonable care to provide and maintain safe, sound and suitable machinery, roadway structures and instrumentalities.
6. Where a railroad negligently maintained a switch stand so near its track as to imperil the safety of its employes, and an injured employe testified that he did not know of such dangerous proximity, and had never thrown the switch prior to the day of the accident, and up to that day had never done any switching in the portion of the yard in which such switch stand stood, it could not be said, as a matter of law, that he was guilty of contributory negligence in attempting to mount an engine near the switch.
7. Where a servant assumes the risk, the question of his contributory negligence is immaterial.

8. While the occupation of a freight brakeman is a perilous one, and those who engage in it must be held to have anticipated its dangers, and to have assumed the risks ordinarily incident thereto, yet they assume only the ordinary risks of the employment, and not extraordinary ones, unless they are aware of such at the time of their employment, or, on learning of their existence, they continue in the employment after the lapse of a reasonable time for the defects to be remedied or removed.
9. Whether a freight brakeman engaged in switching, and who was injured while mounting an engine by coming in contact with a switch stand placed near the track, knew or should have known of the dangerous proximity of such switch stand to the track, so as to have assumed the risk of injury therefrom, *held*, under the evidence, a question for the jury.
10. No case should be withdrawn from the jury unless the conclusion necessarily follows from the facts as a matter of law that no recovery could be had on any view which could reasonably be drawn from the facts which the evidence tends to establish.

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

ACTION by Joseph D. McCabe against the Montana Central Railway Company. From a judgment of nonsuit, and from an order denying a new trial, plaintiff appeals. Reversed.

Mr. F. D. Larrabee, and Messrs. Downing & Stevenson, for Appellant.

That defendant was negligent, or at least that it was a question for the jury to say whether or not the defendant was negligent under the circumstances proved in this case, is established to a certainty by the courts of last resort of all the states. Alabama—*Ry. v. Davis*, 92 Ala. 300; *Ry. v. Thompson*, 94 Ala. 636; *Ry. v. Burton*, 12 So. Rep. 88; *Ry. v. Bouldin*, 25 So. Rep. 903. Colorado—*Wilson v. Ry.*, 2 Pac. p. 1. Dakota—*Boss v. Ry.*, 5 Dak. 308. Illinois—*Ry. v. Welch*, 52 Ill. 183; *Ry. v. Greg*, 58 Ill. 272; *Ry. v. Russell*, 91 Ill. 298; *Ry. v. Whalen*, 19 Ill. App. 116. Indiana—*Penn. Co. v. McCormack*, 30 N. E. 27. Iowa—*Allen v. Ry.*, 57 Iowa, 623; *Kearns v. Ry.*, 66 Iowa, 599; *Bryce v. Ry.*, 103 Iowa, 665; *Keist v. Ry.*, 110 Iowa, 32. Kansas—*Ry. v. Irwin*, 37 Kan. 701; *Ry. v. Michaels*, 57 Kan. 474. Kentucky—*Nance v. Ry.*, 17 S. W. 570; *Ry. v. Pyle*, 18 S. W. 938; *Hughes v. Ry.*, 48 S. W. 671. Louisiana—*Erslew v. Ry.*, 49 La. Ann. 86. Maine—*Nugent*

v. Ry., 80 Me. 62. Maryland—*Ry. v. Russel*, 88 Md. 563. Massachusetts—*Holden v. Ry.*, 129 Mass. 268; *Scanlon v. Ry.*, 147 Mass. 484; *Babcock v. Ry.*, 150 Mass. 467. Michigan—*Sweet v. Ry.*, 87 Mich. 559. Minnesota—*Clark v. Ry.*, 28 Minn. 128; *Robel v. Ry.*, 35 Minn. 84; *Johnson v. Ry.*, 43 Minn. 53; *Flanders v. Ry.*, 51 Minn. 193. Mississippi—*Ry. v. Bishop*, 25 So. Rep. 867. Missouri—*Murphy v. Ry.*, 115 Mo. 111. Montana—*Kelley v. Co.*, 16 Mont. 484. North Carolina—*Brinkey v. Ry.*, 107 N. Car. 731. New York—*Fredenburg v. Ry.*, 114 N. Y. 582. Oregon—*Johnson v. Ry.*, 23 Ore. 94. Rhode Island—*Whipple v. Ry.*, 35 Atl. 305. South Dakota—*Gates v. Ry.*, 2 S. D. 422. Texas—*B. & E. v. La None*, 80 Texas, 117; *Ry. v. Graves*, 21 S. W. 606; *Ry. v. Hohn*, 21 S. W. 942; *Ry. v. Taylor*, 53 S. W. 362. Utah—*Piddock v. Ry.*, 5 Utah, 612. United States—*Cent. Trust Co. v. Ry.*, 73 Fed. 661; *Wood v. Ry.*, 88 Fed. 44. West Virginia—*Riley v. Ry.*, 27 W. Va. 145. Wisconsin—*Dorsey v. Ry.*, 42 Wis. 583; *Hulehan v. Ry.*, 58 Wis. 319; *Kelleher v. Ry.*, 80 Wis. 584; *Colf v. Ry.*, 87 Wis. 273. Miscellaneous—22 A. E. Ry. Cases, 245, note; 48 A. E. Ry. Cases, 168, note.

Contributory negligence and assumption of risk, which is but a species of contributory negligence, is a matter of defense, and the burden of proving it rests upon the defendant, and the plaintiff in his pleading need not negative the facts. (*Thompson v. Ry.*, 72 N. W. 962; *Higley v. Gilmer*, 3 Mont. 90; *Prosser v. Ry.*, 17 Mont. 372; *McGee v. Ry.*, 78 Cal. 430, 21 Pac. 114; *Ry. v. Heines*, 132 Ill. 161; *Hulehan v. Co.*, 68 Wis. 520; *Wells v. Ry.*, 56 Iowa, 520, see page 525; 5 Pleading & Pr. 1 *et seq.*; 14 Am. & Eng. Ency. of Law, 844; 38 Am. & Eng. Ry. Cases, note, 176.)

It is the master's duty to furnish a safe place for his servants to work, and the plaintiff may assume that the place furnished him is a safe place. (*McDonald v. Co.*, 46 Atl. 707; *Kincaid v. Ry.*, 22 Ore. 35; *Co. v. Yockey*, 103 Fed. 265; *Ry. v. Heines*, 132 Ill. 161; *Sil. v. Sov.*, 128 Cal. 187; *Co. v. Ry.*, 126 Ind. 445; *Porter v. Ry.*, 60 Mo. 160; *Morton v. Ry.*, 81 Mich. 423;

Ry. v. Ayl., 79 Texas, 675; *Ry. v. Barsolow*, 55 Ill. App. 203; *Ry. v. Smith*, 57 S. W. 999; *Grannis v. Ry.*, 81 Iowa, 444; *Co. v. Moran*, 44 Md. 283; *Co. v. Irwin*, 37 Kan. 701; *Higgins v. Co.*, 43 Mo. App. 547; *Ry. v. Col.*, 33 Mich. 133; *Kan. v. Smith*, 89 N. Y. 375.)

Prior to the time that the plaintiff was injured he had never thrown switch number 2 but once, and plaintiff was doing his work in the customary way, and when doing it in the customary way it cannot be said as a matter of law that he was guilty of contributory negligence. (*Prosser v. Ry.*, 17 Mont. 372; *Nelson v. Carpenter*, 56 Fed. 451; *Nelson v. Ry.*, 14 Am. & Eng. Ry. Cases (New Series), 374; *Pierre v. Ry.*, 5 Am. & Eng. Ry. Cases (New Series), 407; *Ry. v. Sutherland*, 143 Ill. 48; *Ry. v. McCormack*, 30 N. E. 27; *Omelia v. Ry.*, 115 Mo. 205; *Thitsell v. Ry.*, 67 Iowa, 150; *Flanders v. Ry.*, 51 Minn. 193, and cases cited.)

The plaintiff denied actual knowledge of the dangerous location of the switch stand and there is no testimony to the contrary, and that his opportunities, as shown from the evidence, were insufficient, from which it can be held as a matter of law that he had constructive knowledge is conclusively shown by the following cases: *Johnson v. Ry. Co.*, 43 Minn. 53; *Central Trust Co. v. Ry. Co.*, 73 Fed. 661; *Wood v. Ry. Co.*, 88 Fed. 44; *Dorsey v. Ry. Co.*, 42 Wis. 583; *Colf v. Ry. Co.*, 87 Wis. 273; *Sweet v. Ry. Co.*, 87 Mich. 559; *Ry. Co. v. Michaels*, 57 Kan. 474; *Ry. Co. v. Thompson*, 94 Ala. 636; *Errlew v. Ry. Co.*, 49 La. Ann. 86; *Ry. Co. v. Welch*, 52 Ill. 183; *Brinkley v. Ry. Co.*, 107 N. C. 731; *Nanse v. Ry.*, 17 S. W. 570; *Hughes v. Ry.*, 48 S. W. 671; *Babcock v. Ry.*, 150 Mass. 467; *Scanlon v. Ry.*, 147 Mass. 484; *Keist v. Ry.*, 110 Iowa, 32; *Bryce v. Ry.*, 103 Iowa, 665; *Pa. Co. v. McCormick*, 30 N. E. 27; *Ry. v. Russell*, 88 Md. 563; *Nugent v. Ry.*, 80 Me. 62; *Murphy v. Ry. Co.*, 115 Mo. 111; *Whipple v. Ry. Co.*, 35 Atl. 305; *B. & F. v. La None*, 80 Texas, 117; *Ry. Co. v. Taylor*, 53 S. W. 362; *Piddock v. Ry. Co.*, 5 Utah, 612; *Willson v. Ry. Co.*, 2 Pac. 1; *Johnson v. Ry. Co.*, 23 Ore. 94; *Voorhees*

v. *Ry. Co.*, 44 Atl. 335; *Keist v. Ry. Co.*, 81 N. W. 181; *Ry. Co. v. Morrisy*, 117 Ill. 376; *Ry. v. Bundy*, 53 N. E. 175; *Ry. v. Peterson*, 6 Am. Neg. Rep. 225; *Ry. v. Vesta*, 49 S. W. 204; *Harding v. Ry.*, 83 N. W. 395.

Where a rule of the company imposes upon an employe the duty of inspection in the using of appliances, it does not change the common-law rule, and only requires the plaintiff to use such ordinary care to ascertain defects as is consistent with his other duties. (*Railway Co. v. Graham*, 94 Ala. 545; *Ry. Co. v. Fry*, 131 Ind. 319; *O'Malley v. Ry.*, 67 Hun. 130, 51 N. Y. S. R. 67, 22 N. Y. Supp. 48, affirmed in 142 N. Y. 665; *Ry. Co. v. Carroll*, 84 Fed. 772.)

Mr. I. Parker Veazey, for Respondent.

Citing in opposition to the contentions of the appellant: *Tuttle v. Ry. Co.*, 122 U. S. 189; *Sisco v. Ry. Co.*, 145 N. Y. 296, 39 N. E. 958; *Brown v. R. R. Co.*, 59 N. Y. 672; *Davis v. R. Co.*, 21 S. C. 93; *Allen v. Ry. Co.*, 19 N. W. 870; *Gould v. R. Co.*, 24 N. W. 227; *Heath v. Whitebreast, etc. Co.*, 23 N. W. 148; *Randall v. R. Co.*, 109 U. S. 478; *Cummings v. H. & L. S. & R. Co.*, 68 Pac. 852; 1 Bailey Per. Inj. Sec. 1121; *Highland Ave. & D. R. Co. v. Walters*, 8 So. 360; *Central Ry. v. Mosley*, 38 S. E. 350; *Morris v. Duluth Ry. Co.*, 108 Fed. 747; *Chicago, etc. Ry. Co. v. Davis*, 53 Fed. 61; *Richmond, etc. R. Co. v. Bivins*, 15 So. 515; *George v. Mobile, etc. R. Co.*, 19 So. 784; *Davis v. Western Ry.*, 18 So. 173; *Ferguson v. Chicago, etc. Ry. Co.*, 59 N. W. 1026; *Union Pac. Ry. Co. v. Estes*, 16 Pac. 140; *Carrier v. Union Pac. Ry. Co.*, 59 Pac. 1075; *Quirouet v. Ala. etc. R. Co.*, 36 S. E. 599; *Fritz v. Salt Lake, etc. Co.*, 56 Pac. 93; *Jenkins v. Cotton Mills*, 25 So. 645; *Linton, etc. Co. v. Persons*, 43 N. E. 653; Bailey's Master's Liability, p. 191; *Ragon v. Toledo, etc. Co.*, 56 N. W. 612; *Helmke v. Thilmany*, 83 N. W. 360; *Dillenberger v. Weingartner*, 45 Atl. 638; Bailey, Master's Liability, Sec. 509; *Texas, etc. R. Co. v. Taylor*, 44 S. W. 893; Wharton on Neg. Sec. 314; *Muldowney v. Ry. Co.*, 39 Iowa, 620; *McKee v. Ry.*

Co., 50 N. W. 211; *Ry. Co. v. Brown*, 43 N. E. 362; *Way v. Ill. Cen. R. Co.*, 40 Iowa, 343; *Goldthwaite v. Ry. Co.*, 36 N. E. 486; *Richards v. Rough*, 53 Mich. 213; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 558; *Coombs v. Fitchburg Ry. Co.*, 30 N. E. 1140; *Goodes v. Boston, etc. R. Co.*, 38 N. E. 500; *Pahlan v. Detroit Ry. Co.*, 81 N. W. 103; *De Forrest v. Jewett*, 88 N. Y. 268; *Gibson v. Erie Ry. Co.*, 63 N. Y. 449; *Lyon v. Canada So. Ry. Co.*, 10 Ontario, 745; 26 Am. & Eng. R. Cas., 345; *Dacey v. N. Y. etc. R. Co.*, 47 N. E. 418; *Bell v. Ry. Co.*, 47 N. E. 118; *Thane v. Old Colony R. Co.*, 37 N. E. 309; *Ferren v. R. Co.*, 143 Mass. 197, 200; *Skidmore v. Ry. Co.*, 61 N. W. 765; *Boyd v. Harris*, 35 Atl. 222; *Chicago, etc. R. Co. v. McGinnis*, 68 N. W. 1057; *New York, etc. Co. v. Ostman*, 45 N. E. 651; *Wilson v. Louisville, etc. R. Co.*, 4 So. 701; *Brown v. Chicago, etc. Ry. Co.*, 28 N. W. 487; *Mays v. Chicago, etc. Ry. Co.*, 19 N. W. 680; *Pennsylvania Co. v. Finney*, 42 N. E. 816; *Coal Co. v. Hoodlet*, 129 Ind. 327; *East Tenn. etc. Ry. Co. v. Head*, 18 S. E. 976; *Wolf v. Ry. Co.*, 14 S. E. 199; *Sundy v. Savannah, etc. R. Co.*, 23 S. E. 841; *Lovejoy v. Boston, etc. R. Co.*, 125 Mass. 79; *Ladd v. New Bedford R. Co.*, 119 Mass. 412; *Hall v. Wakefield St. Ry. Co.*, 59 N. E. 668; *Blackstone v. Central Ry. Co.*, 38 S. E. 79; *Kelly v. Baltimore, etc. R. Co.*, 11 Atl. 659.

MR. COMMISSIONER CALLAWAY prepared the following opinion for the court:

Appeal from a judgment of nonsuit and from an order denying plaintiff's motion for a new trial.

The plaintiff brought this action to recover damages for injuries sustained by him in defendant's railway yards in Great Falls, caused, as he alleges, by defendant's negligence in constructing and maintaining a switch stand so near its railway track that plaintiff, in the performance of duty, was struck thereby as he attempted to mount a moving engine, and, falling thereunder, was run over, resulting in the loss of his left leg a few inches above the knee.

A somewhat extended statement of the existing conditions seems to be necessary. In the north end of the freight yard, where the accident occurred, the tracks run northerly and southerly. The easterly one is called the "house track." Adjacent to the house track on the west is the lead track, which is somewhat in the form of an arc of a circle. Other tracks connect with the lead track at the northerly and southerly portions thereof, and each in appearance, taken in conjunction with the lead track, is not unlike the string to a bow. The first track west of the lead track is called "No. 7," the next west "No. 6," and so on, there being seven of these connecting tracks. Where each of the tracks connects with the lead track at the northerly end there is a switch stand, which is numbered to correspond with the connecting track. Thus the northerly switch stand is No. 1, and the next to it is No. 2. The distance between No. 1 and No. 2 is 185 feet. The seven switch stands are similar, and are the same distance from the lead track, but plaintiff testified that he did not know this until after the accident. On the top of each is what the witnesses call a "target," and this is surmounted by two prongs, upon which lights are placed at night. It is forty-five inches from the center of switch stand No. 2 to the easterly rail of the lead track when the target is parallel with the track; but when the switch is turned so that cars may pass from the lead track to track No. 2 the target is at a right angle with the tracks, and it is then but forty inches from the target to the easterly rail of the lead track. At the time the measurements were taken, which was a day or two prior to the trial, the distances between the switch stands and the track were the same as they had been for the two years immediately preceding, and this would include the time in which plaintiff worked for the defendant in the year 1899.

The testimony discloses that the steps on an engine similar to the one in use at the time of the accident project over the track a distance of thirty inches, and the space between the engine and the switch stand, the target being at a right angle with the track, when the engine is backing in on track No. 2,

is about ten inches. Prior to the accident, which occurred December 13, 1899, plaintiff had been in defendant's employ as head brakeman on a freight train for nearly three months. About a year before he had been in defendant's employ for a few months, serving as helper in the boiler shop, hostler's helper, and fireman on a switch engine; but in none of these capacities did he ever do any switching in that portion of the yard where he was afterwards injured. While in the discharge of his duties as brakeman, plaintiff became familiar with the railroad yards at Havre, Helena, Clancy, Belt Mine, Sand Coulee and Neihart. In all of these places he did considerable switching, and in all of those yards he had ridden on the sides of engines and cars past the switch stands, and was never interfered with by the switch stands nor targets thereon in any way. Throughout defendant's entire system, save in the northerly portion of the Great Falls yards, it appears that the switch stands are about six feet from the track. There are eighteen switches in the Great Falls yards and all are about six feet from the track, save the seven mentioned. Plaintiff testified that he did not know until after the accident that the seven were any closer to the track than are the others on the system. Plaintiff testified that he had never done any switching in the north end of the Great Falls yards prior to the morning in question. While plaintiff was in the employment of the defendant as head brakeman, the train started from different places in the yards. In coming into the yard plaintiff never had to throw any switches, but did throw switches in different parts of the yard upon going out. It was his duty to couple the engine and tender on every train that was taken out on which he worked as brakeman, but there were exceptions to that rule.

The defendant pleaded that the plaintiff was guilty of contributory negligence, and that he had assumed the risk of the employment. In order to determine whether the plaintiff was guilty of such contributory negligence as will defeat his action it becomes necessary to look to the situation of the defendant and plaintiff—the master and servant—at the time of the acci-

dent. On the afternoon of the day on which plaintiff was hurt he was summoned to take out a train. Going to the yards he found the train he was to take out standing on track No. 2. No engine was as yet attached. Engine No. 500, which had been assigned to the train, was on track No. 1. Another engine, by mistake, had been let in on track No. 2. Plaintiff went to switch stand No. 2, and threw it to let the engine on that track come to the lead track, so that engine No. 500 could move to track No. 2. This was the only occasion upon which he ever threw switch No. 2. He then went to switch stand No. 1, and threw that to allow engine No. 500 to go from track No. 1 to the lead track, which it immediately did. In the meantime the conductor had again thrown switch No. 2 to allow this engine, No. 500, to go to the train standing on track No. 2. It was then standing about thirty feet north of switch No. 1. Plaintiff started to walk to switch No. 2. At one place in the testimony plaintiff says he walked toward switch No. 2 with the intention of turning it. On cross-examination he testified that he could have safely discharged his duty and have ridden to the train made up on track No. 2 by getting onto the engine near switch No. 1, and said that he walked towards switch No. 2 leisurely until the engine caught up with him; that there was no purpose in doing so except to put in the time while the engine was going along. When about twenty feet from switch stand No. 2, the engine, traveling about five or six miles an hour, caught up with him, and he then mounted it by getting upon the steps, but before he had fully straightened up his body came in contact with the prongs and target upon switch stand No. 2. He was knocked from the engine, which ran over his left leg. The witnesses testified that it is customary for employes in a railway yard to mount an engine when it is not going faster than six miles an hour.

One ground urged by defendant's counsel in his motion for a nonsuit is: "Because it appears from the plaintiff's proof that the duties which he was seeking to perform at the time of the accident complained of could have been performed safely

and without injury or danger to him, but he voluntarily and unnecessarily chose a dangerous method of performing these duties, and unnecessarily placed himself in a position of known peril, thereby negligently contributing to the injury for which he now seeks damages from the defendant." In his brief counsel urges this position with great force, and cites the following authorities in his support: *Cummings v. Helena & Livingston S. & R. Co.*, 26 Mont. 434, 68 Pac. 852; 1 Bailey's Personal Injuries, Sec. 1121; *Highland Ave. & B. R. Co. v. Walters*, 91 Ala. 435, 8 South. 360; *Central of Ga. Ry. Co. v. Mosley*, 112 Ga. 914, 38 S. E. 350; *Morris v. Duluth, S. S. & A. Ry. Co.*, 108 Fed. 747, 47 C. C. A. 661; *Chicago & Northwestern Ry. Co. v. Davis*, 53 Fed. 61, 3 C. C. A. 429; *Richmond & D. R. Co. v. Bivins*, 103 Ala. 142, 15 South. 515; *George v. Mobile & O. R. Co.*, 109 Ala. 245, 19 South. 784; *Davis v. Western Ry. of Alabama*, 107 Ala. 626, 18 South. 173; *Ferguson v. Chicago, M. & St. P. Ry. Co.*, 100 Iowa, 733, 69 N. W. 1026; *Union Pac. Ry. Co. v. Estes*, 37 Kan. 715, 16 Pac. 131; *Carrier v. Union Pac. Ry. Co.*, 61 Kan. 447, 59 Pac. 1075; *Quirouet v. Alabama G. S. R. R. Co.*, 111 Ga. 315, 36 S. E. 599; *Fritz v. Salt Lake & O. G. & E. L. Co.*, 18 Utah, 493, 56 Pac. 90; *Jenkins v. Maginnis Cotton Mills*, 51 La. Ann. 1011, 25 South. 645.

There can be no question as to the correctness of the legal proposition upon which counsel relies, but is it applicable to the facts in this case? That the duties plaintiff was seeking to perform could have been performed safely and without injury to him is conceded, but did he voluntarily or unnecessarily place himself in a position of known peril? Did he know, or ought he to have known, that the way he adopted was unsafe? Did he know, or ought he to have known, that the switch stand was but forty inches from the track? The testimony discloses that the switch stands at all other places upon defendant's system were about six feet from the track, and plaintiff had frequently ridden past them without injury on the sides of cars and engines.

It is the duty of the employer to use all reasonable care to provide a safe place in which the employe may perform his service (*Kelley v. Fourth of July M. Co.*, 16 Mont. 484, 41 Pac. 273); that is, reasonable care considered in relation to the kind of business in which he is engaged (*Kelley v. Cable Co.*, 8 Mont. 440, 20 Pac. 669). In the case of *Pikesville, etc. R. Co. v. Russell*, 88 Md. 563, 42 Atl. 214, the court said: "It is the duty of the master to exercise all reasonable care to provide and maintain safe, sound and suitable machinery, roadway, structures and instrumentalities; and he must not expose his employes to risks beyond those which are incident to the employment, and were in contemplation at the time of the contract of service; and the servant or employe has a right to presume that the master has discharged these duties. *Stricker's Case*, 51 Md. 47, 34 Am. Rep. 291; *Baker's Case*, 84 Md. 21, 35 Atl. 10; 3 Elliott on Railways, Secs. 1288 to 1291, and authorities cited." And see *Berg v. B. & M. Con. C. & S. M. Co.*, 12 Mont. 212, 29 Pac. 545; *Ill. Cent. R. R. Co. v. Welch*, 52 Ill. 183, 4 Am. Rep. 593; *Georgia Pacific Railway Co. v. Davis*, 92 Ala. 300, 9 South. 252, 25 Am. St. Rep. 47; *St. Louis, Ft. Scott & Wichita R. R. Co. v. Irwin*, 37 Kan. 701, 16 Pac. 146, 1 Am. St. Rep. 266; *Bryce v. Chicago, M. & St. P. Ry. Co.*, 103 Iowa, 665, 72 N. W. 780.

Mr. Justice De Witt, in *Prosser v. Montana Central Railway Co.*, 17 Mont. 372, 43 Pac. 81, 30 L. R. A. 814, states the tenor of the authorities to be "that, if the question of negligence or contributory negligence is a fairly disputed question of fact, it must be resolved by the jury, but that, if the evidence is perfectly clear, the matter is for the court; and by 'perfectly clear,' the authorities say, is meant not perfectly clear in the view of the particular court or persons composing the court which is reviewing the matter, but rather in the judgment of reasonable men of sound minds. That is, if different conclusions might be drawn by different men of fair, sound minds, then the matter must go to the jury; but, if only one conclusion can be reached by men of fair, sound minds, the determination is for the court."

(*Berg v. Boston & Montana Con. C. & S. M. Co.*, *supra*; *Sweeney v. City of Butte*, 15 Mont. 274, 39 Pac. 286; *Nord v. Boston & Montana Con. C. & S. M. Co.*, 30 Mont. 48, 75 Pac. 681.)

As to whether the plaintiff knew, or reasonably should have known, that he was adopting a dangerous course in mounting the engine when and where he did is a question upon which men of fair, sound minds may differ. Plaintiff was entitled to rely upon the presumption that the defendant had properly constructed its railway line and appliances. However, he was somewhat familiar with the Great Falls yards, as the facts herein recited show, and "what a man in law ought, by the exercise of reasonable diligence, to know, he does know" (*Bryce v. C., M. & St. P. Ry. Co.*, 103 Iowa, 665, 72 N. W. 780); but to what extent was he familiar with the switch stand in question? Ought he, by the exercise of reasonable diligence, to have known its location and proximity to the track? He testified that he did not know the distance the seven switch stands were from the track; that he never threw switch stand No. 2 before the afternoon upon which he was hurt, and then threw it but once.

Throughout this inquiry it must be borne in mind that on a motion for a nonsuit every fact will be deemed proved which the evidence tends to prove. Such has always been the rule of practice in this court. (*Herbert v. King*, 1 Mont. 475; *Gans v. Woolfolk*, 2 Mont. 463; *McKay v. Montana Union Ry. Co.*, 13 Mont. 15, 31 Pac. 999; *Creek v. McManus*, 13 Mont. 152, 32 Pac. 675; *State ex rel. Pigott v. Benton*, 13 Mont. 306, 34 Pac. 301; *Mayer v. Carothers*, 14 Mont. 274, 36 Pac. 182; *Soyer v. Great Falls Water Co.*, 15 Mont. 1, 37 Pac. 838; *Powers v. Klenzie*, 15 Mont. 177, 38 Pac. 833; *Jensen v. Barbour*, 15 Mont. 582, 39 Pac. 609; *Emerson v. Eldorado Ditch Co.*, 18 Mont. 247, 44 Pac. 969; *Holter Lumber Co. v. Fireman's Fund Ins. Co.*, 18 Mont. 282, 45 Pac. 207; *State ex rel. Harmon v. Conrow*, 19 Mont. 104, 35 Pac. 240; *Morse v. Granite County Commissioners*, 19 Mont. 450, 47 Pac. 639; *Cameron v. Kenyon-Connell Commercial Co.*, 22 Mont. 312, 56 Pac.

358, 44 L. R. A. 508, 74 Am. St. Rep. 602; *Cummings v. Helena & Livingston S. & R. Co.*, 26 Mont. 434, 68 Pac. 852; *Cain v. Gold Mtn. Mfg. Co.*, 27 Mont. 529, 71 Pac. 1004; *Coleman v. Perry*, 28 Mont. 1, 72 Pac. 42; *Ball v. Gussenhoven*, 29 Mont. 321, 74 Pac. 871; *Nord v. Boston & Montana Con. C. & S. M. Co.*, 30 Mont. 48, 75 Pac. 681.)

Counsel for defendant argues that plaintiff, in going into and out of this portion of the Great Falls yards during a period of three months, must have noticed the proximity of these switch stands to the lead track, and especially must have done so at the two times he threw them immediately prior to the accident. This is not conclusive. As the court remarked in the case of *Southern Kan. Railway Co. v. Michaels*, 57 Kan. 474, 46 Pac. 938: "In *Rouse v. Ledbetter*, 56 Kan. 348, 43 Pac. 249, an injury to a switchman resulted from a defective structure in the yard, and one that he might have seen by the reasonable use of his eyesight. It was held, however, that the fact that he was working in that part of the yard, and might have seen it if his attention had been called to it, was not conclusive evidence of contributory negligence. It was said: 'The faculty of close observation of objects is largely a gift. Some persons may walk once along a street, and be able, without any special effort, to describe every prominent object upon and every projection into the street, while others might go up and down the same street for a year, who could not describe such objects and projections. * * * Many dangers necessarily attend the performance of the duties of a yard switchman, but the master is not allowed to increase the hazards of his servant by placing pitfalls, obstructions, traps or inclines in his path, whereby he may lose his footing, and be mangled or killed.' " (*Dorsey v. Phillips, etc. Construction Co.*, 42 Wis. 583.)

A railroad company is not an insurer of the safety of its employes. All the law demands it to do is to "exercise all reasonable care to provide and maintain safe, sound and suitable machinery, roadway, structures and instrumentalities." Whether it did so in this instance we are unable to say. The defendant's

side of the case is not before us. From the plaintiff's showing we should say it did not. He proved, *prima facie*, that the defendant negligently maintained a switch stand so near its track as to imperil the safety of its employes. In the face of affirmative testimony to the effect that plaintiff did not know the dangerous proximity of switch stand No. 2 to the track, had never thrown it prior to the day of the accident, and prior to that day had never done any switching in that portion of the yard, it cannot be said, as a matter of law, that the plaintiff was guilty of contributory negligence. Thus we do not say that the plaintiff was negligent; neither do we say that he was not negligent; but we do say, upon the record presented, that the question of his negligence is one of fact, which should be submitted to the jury for its determination. (*Wastl v. Montana Union Ry. Co.*, 24 Mont. 159, 61 Pac. 9; *Piddock v. Union Pac. Railway Co.*, 5 Utah, 612, 19 Pac. 191, 1 L. R. A. 131; *Sweet v. Mich. Cent. R. R. Co.*, 87 Mich. 559, 49 N. W. 882; *Keist v. Chic. G. W. R. R. Co.*, 110 Iowa, 32, 81 N. W. 181; *Babcock v. Old Colony R. R. Co.*, 150 Mass. 467, 23 N. E. 325; *Hollenbeck v. Mo. Pac. Ry. Co.*, 141 Mo. 97, 38 S. W. 723, 41 S. W. 887; *Johnston v. Oregon S. L. Ry. Co.*, 23 Ore. 94, 31 Pac. 283; *Boss v. Northern Pac. R. R. Co.*, 5 Dak. 308, 40 N. W. 590; *North Chicago St. R. R. Co. v. Dudgeon*, 184 Ill. 477, 56 N. E. 796; *Vorhees v. Lake Shore & M. S. Ry. Co.*, 193 Pa. St. 115, 44 Atl. 335; *Whitcher v. Boston & M. R. R. Co.*, 70 N. H. 242, 46 Atl. 740; *Peirce v. Clavin*, 82 Fed. 550, 27 C. C. A. 227; *Hennesy v. Bingham*, 125 Cal. 627, 58 Pac. 200.)

As to the question of assumed risk. Of course, if plaintiff assumed the risk, the question of his contributory negligence is out of the way. (*Ball v. Gussenhoven*, 29 Mont. 321, 74 Pac. 871.) The occupation of a freight brakeman is a perilous one at best, and those who engage in it must be held to have voluntarily gone into it anticipating its dangers, but only the dangers which one may ordinarily encounter in the nature of the calling. The authorities hold that the plaintiff is to be held

as having assumed the ordinary risks of the business, but not any extraordinary risks, unless it appear that he was aware of such at the time of his employment, or that, upon learning of their existence, he continued in the employment after the lapse of a reasonable time for the defects to be remedied or removed. (*McAndrews v. Montana Union Ry. Co.*, 15 Mont. 290, 39 Pac. 85; *Labatt on Master and Servant*, Secs. 259, 270, 271, *et seq.*; *Geo. Pac. Ry. Co. v. Davis*, 92 Ala. 300, 9 South. 252, 25 Am. St. Rep. 47; *St. Louis, Ft. Scott & Wichita R. R. Co. v. Irwin*, 37 Kan. 701, 16 Pac. 146, 1 Am. St. Rep. 266.)

Whether the plaintiff assumed the risk in this case necessarily depends upon his knowledge or means of knowledge as to the location of switch stand No. 2; that is, whether he knew or should have known its close proximity to the track. Under the circumstances of this case this question, therefore, should be left to the jury. "No cause should ever be withdrawn from the jury unless the conclusion from the facts necessarily follows as a matter of law that no recovery could be had upon any view which could reasonably be drawn from the facts which the evidence tends to establish." (*Cain v. Gold Mtn. Mg. Co.*, 27 Mont. 527, 71 Pac. 1004; *Michener v. Fransham*, 29 Mont. 240, 74 Pac. 448; *Ball v. Gussenhoven*, *supra*; *Nord v. B. & M. Con. C. & S. M. Co.*, *supra*.)

We think the complaint states a cause of action.

The judgment and order should be reversed, and the cause remanded for a new trial.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause is remanded for a new trial.

STATE EX REL. ROCKY MOUNTAIN BELL TELEPHONE COMPANY, RELATOR AND APPELLANT, v. MAYOR, ETC. OF THE CITY OF RED LODGE ET AL., RESPONDENTS.

(No. 1,838.)

(Submitted March 25, 1904. Decided May 9, 1904.)

Telephones—Right to Use Streets—Power of Municipal Corporation—Mandamus.

1. Civil Code, Section 1000, authorizes telephone corporations to construct their lines along and upon the streets of cities, since the term "public roads" includes "streets" of cities.
2. Civil Code, Section 1000, applies as well to foreign corporations which have complied with the statute prescribing the conditions on which foreign corporations may do business in the state, as to domestic corporations.
3. Civil Code, Section 1000, being a general law passed in pursuance of Constitution, Art. XV, Sec. 14, is not modified or limited by the laws relating to the government of cities.
4. Civil Code, Section 1000, is not in conflict with, nor amended by, subsequent enactments granting the power to cities to regulate and prevent the use or obstruction of city streets, sidewalks and public grounds.
5. Under Civil Code, Section 1000, municipalities can only reasonably regulate the construction of telephone lines within their limits, they cannot entirely prohibit such construction as is named in the statute, hence, where a city council refuses to designate the location of poles for a telephone line, and requires the wires to be laid in conduits four feet under the streets, the proper remedy is by *mandamus* to compel the council to designate the location of the poles.
6. That a city is charged with the duty of keeping its streets in repair, and that the cost of maintaining them is raised by public taxation within the city, does not give it jurisdiction over them exclusive of that of the legislative assembly.

Appeal from District Court, Carbon County; Frank Henry, Judge.

Mandamus by the state, on the relation of the Rocky Mountain Bell Telephone Company, against the mayor and city council of the city of Red Lodge and the city of Red Lodge. From a judgment denying the writ, and from an order denying a new trial, relator appeals. Reversed.

Messrs. H. G. & S. H. McIntire, for Appellant.

Mr. G. W. Pierson, and Mr. O. F. Goddard, for Respondents.

MR. COMMISSIONER POORMAN prepared the following opinion for the court:

The relator and appellant is a foreign corporation engaged in constructing, maintaining and operating telephone lines in the state of Montana, and through said state into other states. Desiring to construct a line into and through the city of Red Lodge, in Montana, to do business in said city, and to connect with its line in the state of Wyoming, the relator served upon the mayor and city council of the city of Red Lodge a demand that they designate the places for the erection of the necessary poles and fixtures for the proper construction of the company's lines in, upon and along the streets and alleys of said city. The city council treated this as an application of the relator for a permit to pass through the corporate limits of the city, and refused such permit, for the reason that the same would be in violation of city ordinance No. 97. The council designated a route through the city, however, whereon the company might construct its line in accordance with the provisions of such ordinance. This ordinance prohibits the erection or planting of poles or the stringing or maintaining of wires on or above the streets and alleys within the corporate limits of the city, and provides that such line may be constructed under the streets and alleys, in conduits, on condition that these conduits are at least four feet from the surface grade of the street or alley. This ordinance also provides penalties of fine and imprisonment for violation of its terms. The relator then applied to the district court for a writ of *mandamus* to compel the city to designate the places along the streets for the erection of its poles and the construction of its lines. An alternative writ was issued, and an answer made thereto. A hearing was had, and the court, after consideration, denied the writ. The relator made application for a new trial, which was also denied. From this judgment denying the writ, and from the order overruling the motion for a new trial, relator appeals.

1. Section 14, Article XV, of the State Constitution, reads in part: "Any association or corporation * * * organized for the purpose, or any individual, shall have the right to construct or maintain lines of telegraph or telephone within this state, and connect the same with other lines; and the legislative assembly shall, by general law of uniform operation, provide reasonable regulations to give full effect to this section."

This constitutional provision is not self-executing, but lay dormant until given vitality by legislative enactment. In pursuance of the authority therein given, and in obedience to the constitutional command to enact a "general law of uniform operation," the legislative assembly enacted Section 1000 of the Civil Code, which reads: "A telegraph or telephone corporation, or a person, is hereby authorized to construct such telegraph or telephone line or lines from point to point, along and upon any of the public roads, by the erection of necessary fixtures, including posts, piers and abutments, necessary for the wires; but the same shall not incommode the public in the use of said roads or highways." This section has not heretofore, to our knowledge, been the subject of construction by this court, but similar statutes have been so often construed by other courts, both state and federal, that its construction cannot now be regarded as *res integra*.

Are streets within the meaning of the term "public roads?" The language of the statute with reference to the privilege granted is plain and emphatic. It is a direct grant of authority by the legislature to use the public roads for the construction and maintenance of telephone and telegraph lines, subject only to the condition that the public shall not be incommoded "in the use of said roads and highways." Section 2600 of the Political Code reads in part: "All highways, roads, streets, alleys, courts, places and bridges * * * are public highways." This same language is used in an Act of the Eighth legislative assembly (Laws 1903, p. 66, Chapter 44), amendatory of Chapter II, Article I, Title VI, Part III, of the Political Code, concerning highways and roads. Telegraph and

telephone companies stand upon equal footing under this law. Both are used as means of intercommunication and for commercial purposes. To secure this business, as well as to accommodate the public, their terminals and stations are located in the larger business centers. That was the condition existing when the law was passed. It is not reasonable to conclude that the legislature authorized these companies to transact their business within the state, but left them without authority to enter the centers of population and commerce—places that are necessary to go to in order to do the very business authorized to be done. If the statute applied only to rural ways, the grant would be of little benefit to the public or to the owners of the lines. The very scope and purpose of the Act would be defeated. (*Chamberlain v. Iowa Tel. Co.*, 119 Iowa, 619, 93 N. W. 596.)

“It is contended * * * that the terms ‘public roads and highways,’ used in this statute, apply only to rural public roads and highways, and were not intended to include streets * * * which are always placed under the control of the municipalities. It is enough to say that the control over streets * * * is but delegated power, and in no way detracts from the power of the legislature to exercise such control itself by direct enactment. * * * ‘Public road’ and ‘highway’ are usually understood to mean the same thing. * * * Telegraphs connect cities and villages, and have their stations in such places throughout the country and the civilized world. It is quite as necessary to their construction and operation that they have the right to be and continue upon these highways of cities and villages as upon rural highways. * * * The words of the statute under consideration include all urban as well as rural highways.” (*Abbott v. City of Duluth* (C. C.), 104 Fed. 833; *Keasby on Elec. Wires* (2d Ed.), pars. 6-34.)

Wisconsin, Iowa, Minnesota, Ohio and other states have statutes similar to Section 1000. The courts of these states have construed these laws as a direct grant from the state of the right to use the public roads and highways for the construction

of telephone and telegraph lines, and hold that public roads and highways include streets of cities. (*State ex rel. Tel. Co. v. City of Sheboygan*, 111 Wis. 23, 86 N. W. 657; *Chamberlain v. Iowa Tel. Co.*, *supra*; *City of Zanesville v. Tel. Co.*, 64 Ohio St. 67, 59 N. E. 781, 52 L. R. A. 150, 83 Am. St. Rep. 725; *Northwestern Tel. Exch. v. Minneapolis*, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175; *Abbott v. City of Duluth* (C. C.), 104 Fed. 833. See, also, *City of Toledo v. Tel. Co.*, 107 Fed. 10, 46 C. C. A. 111, 52 L. R. A. 730; *Michigan Tel. Co. v. City of Benton Harbor*, 121 Mich. 512, 80 N. W. 386, 47 L. R. A. 104; *Township of Summit v. Tel. Co.*, 57 N. J. Eq. 123, 41 Atl. 146; *State ex rel. Tel. Co. v. Flad*, 23 Mo. App. 185; *Hodges v. Tel. Co.*, 72 Miss. 910, 18 South. 84, 29 L. R. A. 770; *People v. Trustees* (Sup.), 72 N. Y. Supp. 350; *New York & N. J. Tel. Co. v. Mayor, etc. of Bound Brook*, 66 N. J. Law, 168, 48 Atl. 1022.)

2. Does this section apply to foreign corporations? It is alleged in the petition and admitted in the answer that relator is a foreign corporation; that it has complied with the laws of Montana prescribing the conditions upon which such corporations may do business in this state. The statute Section 1030 *et seq.*, Civil Code, and the amendatory Act of 1901, p. 150, having been complied with, the relator had the right to do business in this state. Section 1000, *supra*, does not attempt to discriminate between domestic and foreign corporations, but is a general law, applicable to all corporations and individuals transacting business of the kind therein named. The decision in *State ex rel. Aachen Ins. Co. v. Rotwitt*, 17 Mont. 41, 41 Pac. 1004, traces the history of the statute prescribing the conditions upon which foreign corporations may do business in this state. See, also, *Mutual Benefit Life Ins. Co. v. Winne*, 20 Mont. 20, 49 Pac. 446.

3. Is Section 1000 modified or limited by laws relating to the government of cities? No municipality, either county or city, possesses any legislative authority except that directly delegated by the state legislature, save the power which arises

from necessary implication. (Cooley's Const. Lim. (6th Ed.) 227.) The legislature, within constitutional limits, is supreme. It alone may grant or delegate power to grant privileges to corporations or individuals, and to establish general policies of the state. The charters of all municipal corporations are the general laws of the state. The Constitution in many instances indicates the general character of legislation. The section of the Constitution above quoted not only declares the right and policy of constructing and maintaining telegraph and telephone lines, but commands the legislature to give vitality to that right and policy "by a general law of uniform operation." A law which excepts a part of a given class is not general and uniform, and the legislature has not attempted to make of streets a separate class of highways. If the subordinate divisions of the state are vested with the authority either of preventing the construction of these lines, or of imposing restrictions which will have that effect, then the legislature has not complied with this constitutional command. It is true that Section 12, Article XV, of the Constitution, provides that no railroad shall be constructed within a city without the consent of the local authorities, but no such provision exists with reference to telegraph and telephone lines, and in view of the provisions of Section 14 of this Article, above quoted, this fact becomes significant.

4. It is claimed by respondent that subsequent enactments, or enactments declared to be subsequent, by Section 5181 of the Political Code, are in conflict with and amend the section under consideration. This section of the Civil Code is a general law, enacted in obedience to a command of the Constitution, and to provide means of enjoying a privilege originating with that instrument. The part claimed to be in conflict is the power granted to the cities to regulate and prevent the use or obstruction of streets, sidewalks and public grounds by signs, telephone poles, posting of handbills and advertisements. The provisions of the Act of March 7, 1893 (Laws 1893, p. 113; Section 4800, Political Code), and of the Act of March 8, 1897 (Laws 1897, p. 203), relative to the powers of cities, are practically the same,

so far as the questions involved in this case are concerned, and it is therefore unnecessary to determine which of these laws is now in force. There is not necessarily any conflict between these laws and said Section 1000. The one granting powers to cities must be construed subject to the provisions of the general law. (Section 4703, Political Code.) The state does not surrender to municipalities entire control over its streets and highways. They are under legislative control. "Municipal by-laws must also be in harmony with the general laws of the state, and with the provisions of the municipal charter. Whenever they come in conflict with either, the by-law must give way." (Cooley on Const. Lim. (7th Ed.) 278.) "Public highways are under legislative control. They are for the use of the public in general, for passage and traffic, without distinction. The restrictions upon their use are only such as are calculated to secure to the general public the largest practicable benefit from the enjoyment of the easement. When the highway is not restricted in its dedication to some particular mode of use, it is open to all suitable methods." (*People v. Eaton*, 100 Mich. 208, 59 N. W. 145, 24 L. R. A. 721.) "The power conferred upon incorporated towns by the general incorporation Act is but a mere grant of limited power to the municipality, which it holds subject to the general laws of the state." (*In re O'Brien*, 29 Mont. 530, 75 Pac. 196.) "But municipal corporations are subordinate parts of the state, and invested with limited powers. The legislature, in granting such powers, does not divest itself of any power over the inhabitants of the district which it possessed before the charter was granted." (*Wilcox v. Deer Lodge County*, 2 Mont. 574.) "No city or village has the power by ordinance or by-laws to make the general laws of the state inoperative." (*People v. Kirsch*, 67 Mich. 539, 35 N. W. 157.) See, also, Section 4703, Political Code of Montana, which prescribes a limitation upon the powers of cities.

In *Wisconsin Tel. Co. v. City of Oshkosh*, 62 Wis. 32, 21 N. W. 828, the court, after deciding that the state had by general law granted the right to the telephone company to construct its

lines along the streets of cities, held that the power subsequently granted to cities "to regulate, control and prohibit the location, laying, use and management of telegraph, telephone and electric light and power wires and poles" was not in conflict with the general law, but must be construed as subordinate thereto. The same conclusion was reached under similar provisions in *Michigan Tel. Co. v. City of Benton Harbor*, 121 Mich. 512, 80 N. W. 386, 47 L. R. A. 104.

There is nothing in the Act delegating powers to cities from which it can be inferred that it was the intention of the legislature that the powers there delegated should operate as a repeal of the general laws of the state, and repeals by implication are not favored.

In *Michigan Tel. Co. v. City of Benton Harbor*, above cited, the court says: "This case forcibly illustrates the danger in holding general laws repealed by implication in granting charters to municipal corporations. Did the legislature intend by the above law for the organization of cities to confer upon those municipalities the power to annul the law in regard to telegraph and telephone companies, and to entirely prohibit the use of the telegraph and the telephone, which have become essential in commercial transactions? Clearly, such an intention should not be attributed to the legislature unless the language of the law leads to no other conclusion. We see no difficulty in giving effect to both laws by holding that the latter Act confers this authority upon municipalities, subject to the general laws of the state in regard to the use of its streets and highways for telegraph and telephone purposes."

5. Is *mandamus* the proper remedy? The statute delegates to cities the authority, and makes it their duty, to regulate the use of streets in such manner as not to incommode public travel, and to regulate the placing of improvements thereon in such manner as to protect the public from inconvenience and danger. Section 1000, *supra*, not only grants the right and privilege of constructing telephone lines, but also defines the manner of their construction "by the erection of necessary fixtures, in-

cluding posts, piers and abutments necessary for the wires." The use of the term "posts, piers and abutments" presupposes what is known as the "overhead system." The manner of constructing these lines is as much a part of this section as is the right of construction given. The city council has a twofold duty to perform: (1) To permit the corporation to enter the city; and (2) to designate the location of poles, abutments, etc. It does not possess the power to prohibit the one any more than it does to refuse the other. The municipality may, in the exercise of its power, prohibit the erection of these poles in places or in a manner which will incommode the public; but they cannot entirely prohibit. They can only regulate, and the regulation must be reasonable. In a sense the city is called upon to grant a privilege. Whether this privilege amounts to a franchise is not here decided. If it is a franchise, it is one which the council cannot refuse to grant under this law. It may, within the bounds of reason, determine the character and height of the poles, but it cannot totally ignore the system of construction named in the statute, and substitute one totally foreign thereto. (*Michigan Tel. Co. v. City of Benton Harbor*, above cited.)

The demand made by the relator upon the council to designate the location where it might erect its poles was answered by the council by reference to an ordinance which forbade the erection of any poles at all, and provided that the wires must be buried at least four feet under ground. This was not a reasonable exercise of discretion within the meaning of this law, and was, therefore, equivalent to an absolute refusal. The council, being charged with this duty, and having failed to perform it, may be compelled by *mandamus* to act. Nor does this in any manner interfere with the discretionary power possessed by the council. It only coerces it into action, leaving it free to exercise its own judgment, circumscribed only by this general law, and by what is reasonable. It is claimed that the city is charged with the duty of keeping its streets in repair, and is liable for damage resulting from a failure to perform this duty; that the

city ought, therefore, to be permitted to exercise exclusive jurisdiction, inasmuch as the cost of maintaining the streets is raised by public taxation within the municipality. Nearly all the public roads of the state—perhaps all—are supported by taxation within the several subordinate divisions of the state, and this same argument would apply equally to counties. But both cities and counties are subordinate to the general laws of the state in all matters.

Mutual Electric Light Co. v. Ashworth, 118 Cal. 1, 50 Pac. 10, is cited by respondents in maintenance of the proposition that *mandamus* is not the proper remedy in this case. The only question decided in that case was: "Where a valid city ordinance requires a special permit of the supervisors before poles can be erected in the streets, and such permit is issued to one electric company and denied to another, the remedy of the latter is not an injunction restraining the superintendent of streets from interfering with its erection of poles in violation of the ordinance." The court further says: "The remedy would seem to be in compelling the granting of a permit in a proper case. * * * The wrong consists in refusing it to the plaintiff when it ought to be granted, and under such circumstances as it is freely granted to the favored corporation." The only inference to be drawn from this decision is that *mandamus*, in the judgment of the court, was the proper remedy to compel the granting of the required permit.

We recommend that the judgment and order appealed from be reversed, and that the cause be remanded to the district court, with instructions to grant the writ prayed for.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order are reversed, and the cause is remanded to the district court, with instructions to grant the writ prayed for.

MR. JUSTICE MILBURN, not having heard the argument, takes no part in this decision.

HEFFERLIN ET AL., RESPONDENTS, v. KARLMAN ET AL.,
APPELLANTS.

(No. 1,844.)

(Submitted March 28, 1904. Decided May 9, 1904.)

*Appeal—Disposition of Demurrer—Failure of Record to Show
—Witness—Cross-Examination.*

1. When the record on appeal fails to show whether appellant's demurrer to the complaint was overruled or withdrawn, the failure to sustain it cannot be reviewed.
2. Error in refusing to permit cross-examination of plaintiffs' witness as to the extent of his admitted interest in the suit is not ground for reversal, where other evidence shows that, for purposes of collection, the witness had assigned to plaintiffs his account against defendants, which constituted one of the causes of action.
3. Cross-examination should not be unduly restricted.

*Appeal from District Court, Park County; Frank Henry,
Judge.*

ACTION by John W. Hefferlin and others against G. W. Karlman and M. Jennings, copartners as Karlman & Jennings. From a judgment for plaintiffs, and the denial of a new trial, defendants appeal. Affirmed.

Mr. John J. McHatton, for Appellants.

Mr. John T. Smith, for Respondents.

MR. COMMISSIONER CALLAWAY prepared the following opinion for the court:

The plaintiffs brought this action against the defendants, Karlman & Jennings, copartners, with whom was joined one Harkins. Harkins defaulted. Karlman & Jennings alone resisted the action, and we shall refer to them hereafter as the defendants. Trial was to a jury, which found for the plaintiffs, whereupon the court entered judgment in their favor. Defend-

ants then moved for a new trial, which was overruled. From the judgment and order overruling their motion for a new trial, they have appealed.

This case is similar in many respects to *Hefferlin v. Karlman*, 29 Mont. 139, 74 Pac. 202, and the decision therein disposes of a number of the points upon which defendants rely. That case was tried in September, 1900; this, in March, 1901.

1. The complaint contains three counts or causes of action. Defendants interposed a demurrer thereto, which their counsel insists should have been sustained. It was directed to each count, alleging that there is a misjoinder of parties defendant to the action; that each of the counts fails to state a cause of action, and is uncertain, for reasons stated; and that the third count is ambiguous as well as uncertain. The record fails to show what action the court took upon the demurrer. Did the court overrule the demurrer, or did defendants withdraw it and answer over? We cannot say. This matter, therefore, is not before us for review.

2. In the first count, plaintiffs allege that between the 5th day of November, 1899, and the 13th day of December, 1899, one Walter M. Hoppe did and caused to be performed labor and services for the the defendants, at their request, in excavating and removing earth on the roadbed of the railroad then being constructed along Trail creek, in Park county, Montana, to the amount and of the value of \$1,428.18; that thereafter, and on the 20th day of December, Hoppe and the defendants had a settlement of their accounts, and it was mutually agreed between them that the defendants owed and stood indebted to Hoppe in that sum of money; that thereafter, and on that day, Hoppe assigned the account to plaintiffs; and that no part thereof has been paid. These allegations were denied by defendants.

Whether the judgment in favor of plaintiffs is correct, turns upon the question as to Harkins' position with reference to the things done. Was he an agent of the defendants, or was he a subcontractor under them? The evidence discloses that the

dealings of Hoppe and his agent, Fitzgerald, were mainly with Harkins. Upon this issue the evidence was conflicting, and the jury settled it by finding for plaintiffs. (*Hefferlin v. Karlman, supra.*) On cross-examination the witness Hoppe said: "I had nothing to do with bringing this lawsuit against the defendants. I have an interest in the result of this lawsuit." Then counsel for defendants asked: "What is the extent of your interest in this lawsuit?" An objection to this question was sustained. This was error, but we do not consider it prejudicial, under the facts disclosed in the record. Hoppe admitted his interest in the suit, and the witness John W. Hefferlin, referring to Hoppe's account, had testified: "When the suit was brought, Mr. Fitzgerald came over to the office, and wanted to put it in with our account to save costs to himself." Defendant Karlman testified: "Walter Hoppe said to me he was sorry he left over his account to Hefferlin Bros., or else it might have been paid by this time." It is thus apparent that the jury clearly understood the extent of Hoppe's interest, and was thus enabled to weigh properly his credibility as a witness. (Code of Civil Procedure, Sec. 3123.)

We again call attention to the rule that cross-examination should not be unduly restricted. (*Kipp v. Silverman*, 25 Mont. 296, 64 Pac. 884; *Cobban v. Hecklen*, 27 Mont. 245, 70 Pac. 805.)

3. The issues presented upon the second count need not be discussed, because our views thereon are fully set forth in *Hefferlin v. Karlman, supra.*

4. The third count in the present case is substantially similar to the second count in *Hefferlin v. Karlman, supra.*, which the court held stated a cause of action. In that case it was held that the evidence introduced at the trial was inapplicable to the pleadings, and that there was a fatal variance between the pleadings and the proof. In the case at bar we find that there was evidence tending to sustain the allegations of the third count. At any rate, the defendants have failed to point out any particular in which it does not. The jury passed upon the

evidence presented by plaintiffs and defendants, and found for the former.

5. We have carefully examined the instructions, and find that defendants have not pointed out any reversible error therein.

Finding no prejudicial error in the case, we are of the opinion that the judgment and order should be affirmed.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

FLOYD-JONES, APPELLANT, v. ANDERSON ET AL.,
RESPONDENTS.

(No. 1,863.)

(Submitted April 20, 1904. Decided May 9, 1904.)

Building and Loan Associations—Maturity of Contract—Withdrawal of Shareholder—Settlement—Effect—Insolvency of Association — Actions Against Shareholder — Evidence—Pleadings—Denial—Sufficiency.

1. Where affirmative matter is pleaded in an answer, a replication thereto stating that plaintiff "has no knowledge or information concerning the allegations thereof sufficient to form a belief," is insufficient as a denial, and said allegations of the answer must be deemed admitted.
2. In an action to foreclose a building and loan association mortgage the member's certificate of stock, and the by-laws and statements printed thereon, constituting the contract between the association and such member, were properly admitted in evidence.
3. In an action to foreclose a building and loan association mortgage it was immaterial, on the question of the admissibility of matter which purported to be the by-laws of the association, whether it in fact constituted such by-laws or not, where it constituted a part of the written contract existing between the shareholder and the association, and was given to him by the association as the by-laws.
4. The by-laws of a building and loan association made the secretary the custodian of its books and records, and charged him with the transaction of business relative to the issue and cancellation of stock. About the time of the maturity of A.'s stock, the secretary wrote to B., acknowledging the

receipt of dues, and stated in the letter that the five-year stock (which was the kind that A. had) contained certain burdensome conditions, and that other longer term stock had been issued, which was more advantageous to the shareholders, all but six of whom had made the exchange. *Held*, in an action to set aside a release of A.'s mortgage and to foreclose the mortgage, that the letter was admissible to show that the company was at the time transacting business, and that a definite five-year contract existed between the association and its original shareholders.

5. Since building and loan associations do not ordinarily have outside creditors, as do general corporations, a deficiency of assets does not render them insolvent, in the proper sense of the word, but merely indicates a loss of capital stock and security, and depreciation of the stock held by the members.
6. Insolvency is a question of fact to be proved by evidence, and is not presumed.
7. Where a certificate of stock in a building and loan association provided that the association would pay to a shareholder the sum of \$100 for each share represented thereby at the end of five years, on condition that the shareholder complied with the terms and conditions thereof, and other literature provided that the stock at maturity should cancel the mortgage, the debt of a borrowing member, who complied with all the terms and conditions of his contract, was canceled, and the mortgage which he executed to secure his loan released, at the expiration of five years.
8. Where a member of a building and loan association has made full settlement, and withdrawn therefrom, such settlement and withdrawal cannot be set aside by the association without showing fraud or bad faith in some form.
9. Where the contract between a borrowing member and a building and loan association has been completed, and the member has withdrawn, it is immaterial whether the contract was one which the association had the power to make.

Appeal from District Court, Meagher County; William L. Holloway, Judge.

ACTION by R. H. Floyd-Jones, as receiver of the Montana Loan & Savings Union of Helena, against Alma B. Anderson, individually and as administratrix of the estate of James T. Anderson, deceased, and another. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. Affirmed.

Mr. T. J. Walsh, for Appellant.

Upon a building and loan association's going into the hands of a receiver for the administration of its assets upon insolvency, borrowing members must pay their mortgages in full and then take their distributive share with non-borrowing members on the final distribution of the assets. (*Leahy v. Associa-*

tion, 76 N. W. 625; *Knutson v. Association*, 69 N. W. 889; *Douglas v. Kavanaugh*, 90 Fed. 373; *Latimer v. Company*, 81 Fed. 776; *Weir v. Granite State Ass'n* (N. J. Ch. 1897), 38 Atl. 643; *Carpenter v. Richardson*, 46 S. W. 452; *Curtis v. Granite State Ass'n*, 69 Conn. 6, 36 Atl. 1023; *Rogers v. Raines* (Ky.), 38 S. W. 483; *Post v. Mechanics' Ass'n* (Tenn. Sup.), 97 Tenn. 408, 37 S. W. 316; *Brown v. Archer*, 1 Mo. App. Rep. 465; *Price v. Kendall* (Tex. Civ. App.), 36 S. W. 810; *Brown v. Archer*, 62 Mo. App. 277; *Tootle v. Singer*, 88 N. W. 446; *Columbia v. Schwartz*, 64 S. W. 743.)

If the association is insolvent, members who have given notice of withdrawal are entitled to no priority in the distribution. They take their *pro rata* just as do the other stockholders. (See the authorities cited above and *Coltrain v. Baltimore*, 110 Fed. 272.)

Any arrangement by which, after a building and loan association becomes insolvent, its officers do permit the amount to be paid on stock or purporting to be due on stock, or to which a party is entitled upon withdrawal, to be applied in satisfaction of a mortgage from the stockholder to the association, is void and ineffective as against creditors and other stockholders.

The officers have no power to enter into any such settlement at which the stock is given a value it does not possess, and have no power under such circumstances to absolve a stockholder from his obligation to bear his proportionate share of the losses of the common enterprise. (*Chapman v. Young*, 65 Ill. App. 131; *Callahan's Appeal*, 124 Pa. St. 138; *Cason v. Seldner*, 77 Va. 293; *Post v. Association*, 37 S. W. 216; *Thompson on B. & L. Associations*, 309; *Canadian v. Quimby*, 79 Ill. App. 105; *Young v. Stevenson*, 81 Ill. App. 40, 180 Ill. 608; *Rickert v. Suddard*, 80 Ill. App. 204, 180 Ill. 149; *Republic v. Swigert*, 135 Ill. 150.)

Our statute provides only for the organization of mutual building and loan associations. (Compiled Statutes, page 796, Sec. 635.) The right of a mutual building and loan association to issue such "definite contract stock," is denied upon grounds

that seem irrefragable in the following cases: *Province v. Interstate* (Tenn.), 58 S. W. 265; *Bertsche v. Association* (Mo.), 48 S. W. 954; *Schell v. Ass'n* (Mo.), 51 S. W. 406; *King v. Union* (Ill.), 48 N. E. 677; *Miller v. Ass'n* (Tenn.), 53 S. W. 231; *Sumrall v. Com'l Bldg. Trust's Assignee* (Ky.), 50 S. W. 69; *Forwood v. Eubank* (Ky.), 50 S. W. 255; *Reddick v. Assignee* (Ky.), 49 S. W. 1075; *Latimer v. Equitable*, 81 Fed. 776; *Leahy v. Association* (Wis.), 76 N. W. 625; *Columbia v. Lyttle* (Colo.), 66 Pac. 247; *Campbell v. Association* (Va.), 37 S. E. 350; *Columbia v. Junquist* (Wy.), 111 Fed. 645; *Gary v. Verity*, 74 S. W. 161; *Caston v. Stafford*, 92 Mo. App. 182; *Richter v. So. B. & L. A.*, 34 So. 562; *O'Malley v. Association*, 36 N. Y. Supp. 1016; *Eversman v. Schmitt*, 41 N. E. 139; *Latimer v. Equitable*, 81 Fed. 782; *Plank v. Indiana*, 62 N. E. 652; *Association v. Aichele*, 61 N. E. 11; *Association v. Shelton*, 61 N. E. 951; *Pioneer Ass'n v. Wilkins*, 85 N. W. 994; *Loan Co. v. Peck*, 49 S. W. 160; *Hammerquist v. Pioneer Ass'n*, 87 N. W. 524.

Money paid by reason of fraud or mistake can be recovered. (*Mowett v. Wright*, 1 Wend. 355.) If by mistake certain stock has been declared to be matured, when in fact it has not matured, equity will correct the mistake and compel restitution. (*Post v. Association*, 37 S. W. 216.)

The continuance of the condition of insolvency for so long a period, the forcing of a balance annually, the creation of a "dividend account" which represented nothing, undoubtedly charge the officers of the corporation *prima facie* with knowledge of its insolvency. (*Williams v. McKay*, 18 Atl. 824; *Cameron v. Kenyon-Connell Co.*, 22 Mont. 312; *Fraylor v. Sonora*, 17 Cal. 594; *Proster v. Baldwin*, 2 Ind. 374.)

Mr. Lewis Penwell, Mr. N. B. Smith, and Messrs. Word & Word, for Respondents.

MR. COMMISSIONER POORMAN prepared the following opinion for the court:

The National Loan & Savings Union was organized as a building and loan association, and was incorporated February 15, 1890. Subsequently the name was changed to the Montana Loan & Savings Union of Helena, Montana. On July 1, 1890, one James T. Anderson became the owner of forty shares of the capital stock of the association, and certificate No. 187, representing the same, was issued to him. On September 1, 1890, the said Anderson and Alma B. Anderson, his wife, borrowed \$3,000 from the corporation, giving their note therefor, due sixty months after date, with five per cent. interest per annum, and five per cent. premium per annum thereon from date until paid, payable monthly. The note further provided that the shares of stock represented by certificate No. 187 "are hereby transferred and pledged to the National Loan & Savings Union as collateral security for the performance of the conditions of this obligation and of the mortgage securing the same." The note also provided for attorney's fees in case of foreclosure. The makers of the note executed to the association a mortgage on certain real estate, conditioned for the payment of the note. The certificate of stock contained the provision that the association would pay to the shareholder the sum of \$100 for each share represented thereby at the end of five years, on condition that the shareholder complied with the terms and conditions thereof. The printed literature was to the effect that this would cancel the mortgage. Anderson, having complied with all the terms of his contract, demanded that his mortgage be released. On August 28, 1895, the corporation issued to him a written release under seal, delivered to him his note, and canceled his certificate of stock. This mortgage release was recorded. In 1898 the association was declared insolvent, and a receiver was appointed. Anderson having died, the receiver filed a claim against his estate for principal, interest and attorney's fees, aggregating \$4,954, alleged to be due on this note and mortgage. The claim was disallowed, and this action was then brought to set aside the release of the mortgage and to foreclose it. Judgment was rendered for defendants. Plaintiff appeals from

this judgment and from the order overruling his motion for a new trial.

1. Exceptions were taken to certain denials contained in the replication to affirmative matter pleaded in the answer. A consideration of one of these will suffice for all. The defendant, as a part of his affirmative defense, alleges the contents of some printed literature of the association. The only denial of this matter found in the replication is that the plaintiff "has no knowledge or information concerning the allegations thereof sufficient to form a belief." It is urged that this denial is insufficient under the statute.

Section 720, Code of Civil Procedure, relating to replications, provides: "Where the answer contains a counterclaim * * * the reply must contain a general or specific denial of each of the material allegations of the counterclaim controverted by the plaintiff, or of any knowledge or information thereof sufficient to form a belief." This section of the Code was amended by the Act of February 22, 1899 (Laws of 1899, p. 142), so as to read: "Where the answer contains a counterclaim or any new matter the plaintiff * * * shall * * * reply to such counterclaim or new matter, denying generally or specifically each allegation controverted by him." This amendment eliminates from the law that part of the statute which reads, "or of any knowledge or information thereof sufficient to form a belief," and also adds to the section the statement, "or any new matter." The pleading must conform to the requirements of the statute, and where the legislature amended the law by striking out that provision which granted permission to deny by alleging a want of information, it was the undoubted intent that that form of pleading should be eliminated, so far as the same related to the replication. This form of denial is therefore insufficient as a denial, and these allegations of the answer must stand admitted to the same extent that they would be if no attempt to deny them had been made.

2. It is claimed by appellant that the court erred in admitting in evidence this certificate of stock and the by-laws and

statements printed thereon. All these matters constituted the contract between the association and Anderson, and were therefore proper to be admitted in evidence.

It is further denied by plaintiff that that which purports to be the by-laws printed on this certificate are in fact the by-laws of this association. Whether they are in fact the by-laws of the association is immaterial. They are a part of the written contract existing between the shareholder and the association, and were given to him by the association as the by-laws, and were, for that reason, proper evidence in the case.

Certain letters were introduced, one of which was written by the secretary to another shareholder, dated April, 1895, in which the secretary acknowledged the receipt of dues, and stated that the old stock, which matured in five years, contained conditions which were deemed burdensome, and that other stock was issued to mature in seventy-eight months, and that all except six shareholders had made the exchange. He also pointed out that this was advantageous to the shareholders. In view of the fact that the by-laws make of the secretary the custodian of the books and records of the association, and charge him with the transaction of business relative to the issue and cancellation of stock, shareholders had a right to rely upon this letter as official, and it was admissible as showing that the company was at that time transacting business, and that the definite contract of maturity in five years did exist between the association and its original shareholders.

The plaintiff introduced but one witness to prove the insolvency of the association. The record contains the general statement made by the witness that the company had been insolvent "ever since after the first year that they were in business, namely, the year 1890." The only evidence appearing, however, from which this general conclusion is drawn, is the following: "At the end of each year they would balance, and say 'by dividend account' so much money. As a matter of fact they never had a dividend account. They did not have any money. Their account at the bank was always in red; that is, it was

always overdrawn. Neither did they have any real estate or other property which the dividend account represented. In figuring the condition of the company, I figured the assets at their own value as shown by the books; full valuation of the mortgage loans on the real estate at what they valued it. On the 1st day of January, 1895, in order to make the books balance, they credited themselves up with about \$15,000 undivided profits and surplus, and they did not have any. * * * Their liabilities exceeded their assets that much. The first year they were in existence they borrowed \$2,300 from the First National Bank and \$10,000 from Mr. Wilson. They paid off Mr. Wilson some money, but there was still a balance due him when the company went into the hands of a receiver."

It must be kept in mind that "a building and loan association" ordinarily does not have outside creditors, as do general corporations; and where there is a deficiency of assets there is no insolvency in the proper sense of the word, but merely a loss of capital stock and security, and depreciation of the stock held by the members. (Thompson on B. & L. Ass'ns, Sec. 120; note *Knutson v. Northwestern Ass'n*, 67 Minn. 201, 69 N. W. 889, 64 Am. St. Rep. 410; *Towle v. Ass'n (C. C.)*, 61 Fed. 446.)

This evidence relative to the insolvency of the association is very indefinite, and possesses no claim to either precision or direction. The fact that the association was \$15,000 in arrears, as shown by one of its books, on the 1st of January, 1895, is not sufficient to charge either the association or Anderson with knowledge of any insolvency either at the date the certificate was issued or the mortgage was released. There is no pretense that the \$2,300 borrowed from the bank was not repaid, nor is there any attempt made to state the amount still claimed to be due to Mr. Wilson. Whether that amount is \$1 or the full amount minus \$1 is not stated. Insolvency is a question of fact, and must be sustained by the evidence. It is never presumed. The facts and admissions appearing in this record are conclusive that this association was transacting business up to the time that this mortgage was canceled; that it

was a going concern; that it received the payments made by Anderson on his stock; that a settlement was made with him; that his certificate was canceled, and that his mortgage was released; that a few months prior to this transaction the association had issued new stock, extending the time of maturity from sixty months to seventy-eight months; and that the acceptance of such new stock, however, was optional with the holders of the old stock, and Anderson did not accept the same. The trial court found that the association was insolvent on July 1, 1895, but that such insolvency was not known to it, or to Anderson, or to the defendants, until June, 1898. This finding is amply sustained by the evidence and facts admitted. There is absolutely no evidence that Anderson acted in bad faith, or knew or was charged with knowledge of any insolvency whatsoever.

At the beginning or head of this certificate of stock are the words: "Date of issue, July 1, 1890. Maturity July 1, 1895." Further on appear the statements: "This union matures its stock at a definite and stipulated time. * * * This stock has no surrender value and cannot be withdrawn until it fully matures. * * * This stock matures at a fixed and definite time. * * * This union matures its mortgages at a fixed and definite time. * * * In consideration of the admission fee, together with the agreement and full compliance with the terms, conditions and by-laws printed on the front and back of this certificate, which are hereby referred to and made a part of this contract, the National Loan & Savings Union agrees to pay to said shareholder * * * the sum of one hundred dollars for each of said shares at the end of five years from the date hereof. * * * This certificate of shares is issued to and accepted by the shareholder upon the following terms and conditions which are hereby assented to by the shareholder." The terms and conditions are sixteen in number, of which, for the purpose of this case, it is necessary to set out only the following: "(1) The shareholder agrees to pay a monthly installment of seventy cents on each share named in the certifi-

cate.” “(4) The agent in all cases acts solely for the shareholder, and the union assumes no obligation for any statements other than contained in its printed literature.” “(8) The by-laws attached to and indorsed on the statement are made a part and parcel thereof.” “(10) The shareholder agrees to pay a cancellation fee of three dollars per share at the time of maturity of the contract, or at the time of procuring a loan. (11) The union reserves the right to require further monthly payments not exceeding twenty-five cents per share to pay off or cancel shares, and for the best interest and protection of all its members.” The by-laws appearing upon the certificate require the payment of an admission fee of two dollars per share, and other requirements substantially the same as those contained in the body of the certificate, so far as the questions here presented are concerned. The printed literature of the association at the time that Anderson became a member contained this statement: “Payment of mortgages. Monthly payments made by a borrowing member on his stock, and all profits apportioned to him, are applied on his stock, which at maturity cancels the mortgage.” The only fixed and definite time named in this contract for the maturity of these shares is July 1, 1895, sixty months after the date of the certificate. It appears that Anderson, on demand of the association, paid the extra twenty-five cents per share per month for fifty months.

This contract was of appellant's own framing. It was not an informal, hastily prepared memorandum, but was part of a carefully devised plan of business. The promise of the corporation was positive and unequivocal that it would, at the expiration of five years, pay to the subscriber the sum of \$100 for each share. If this was intended merely as an estimate, it was an easy thing to say so. We must assume, therefore, that in thus preparing its contract the appellant intended to bind itself to the payment of the stipulated sum in the stipulated time, or it deliberately framed the instrument and issued its printed literature to deceive prospective members and borrowers with an apparent promise to that effect. We cannot assume that any

such deception was intended, but must adopt the construction placed upon this contract by the borrower—that the compliance by him with the terms and conditions thereof would have the effect of canceling his debt and releasing his mortgage at the expiration of five years. This question is elaborately discussed in *Field v. Bldg. Ass'n*, 117 Iowa, 185, 90 N. W. 717, from which a part of the above is copied. And see *Vought v. Ass'n*, 172 N. Y. 508, 65 N. E. 496, 92 Am. St. Rep. 761.

It is admitted that Anderson did comply with all these terms and conditions; that he did pay the seventy cents per share for sixty months; that he did pay the twenty-five cents per share for fifty months; that he did pay the interest and premium on his loan for the full sixty months; that he did pay the cancellation fee of three dollars per share; and it further appears from the evidence and by admissions that the association released this mortgage in regular form, delivered the note to Anderson, accepted the cancellation fee of \$120, duly canceled the stock, so that Anderson from that time on was not recognized as a stockholder, and had no voice in the conduct of the company's affairs. In fact, he complied with his contract in every particular. About three years after that time it was discovered that the association was unable to mature its stock and to comply with its contract with its members, and a receiver was appointed. Nearly two years later this suit was instituted to compel Anderson or his representatives to pay the full amount of this mortgage, with interest and attorney's fees. But no offer whatsoever is made to refund to Anderson's estate the cancellation fee which he had already paid, nor to restore the certificate of stock which had been canceled, that the estate might thereby participate in the division of such funds as remained. The result of such a judgment would be that, notwithstanding Anderson had paid all that he ever agreed to pay, and had ceased to be a member of the corporation, still he must pay in the full amount of his mortgage, with interest thereon from July 1, 1895, in order that the amount to be distributed among the other shareholders might be augmented by that sum, but that

Anderson's estate should not be permitted to participate in this division, and that it would, therefore, lose all that he had paid in as dividends and as cancellation fee. Such a judgment would be inequitable.

The authorities are practically a unit in holding that, where a member of a building and loan association has made full settlement, and withdrawn therefrom, such settlement and withdrawal cannot be set aside by the association without a showing of fraud or of bad faith in some form. In *Reitz v. Hayward*, 100 Mo. App. 216, 73 S. W. 374, the court says: "The law, therefore, does not, in theory, permit withdrawals after an association is insolvent; but, if the surrender of stock was perfected while it was still a going concern, though in fact insolvent, it is an executed transaction, and the proceeds may be retained, unless fraud can be imputed to the withdrawing stockholder." (*Booz's Appeal*, 109 Pa. 592, 1 Atl. 36; *Strohen v. Association*, 115 Pa. 273, 8 Atl. 843.) "After he has been paid off on his withdrawal, and there is a final settlement between him and the society, in the absence of mutual mistake or fraud he can not be compelled to make good a deficiency occurring before the withdrawal, and discovered before the winding up of the association." (Thompson on Building Associations, p. 285, and cases; 4 Am. & Eng. Ency. Law, 1052; Endlich on Building Associations, Sec. 108; *Coltrane v. Association* (C. C.), 110 Fed. 281.)

It appears from the record in this case that Anderson made full settlement with this corporation, and withdrew therefrom by the cancellation of his stock years before any insolvency was discovered; and the record contains no evidence of fraud on the part of Anderson, and we cannot assume that he acted with any fraudulent intent. (Code of Civil Procedure, Sec. 3266; *Jones v. Simpson*, 116 U. S. 609, 6 Sup. Ct. 538, 29 L. Ed. 742.)

It is unnecessary to determine the other question raised, as to whether the corporation had the authority to issue what is termed "definite contract stock," this being a completed transaction. As was stated in *Leahy v. Association*, 100 Wis. 555,

76 N. W. 625, 69 Am. St. Rep. 945: "We need not concern ourselves over the question of whether, under its articles, the corporation had authority to issue this class of stock or not. The stock was issued, and accepted by the petitioner, and we cannot permit either the receiver or the holder to question its validity. It is certainly valid as between the parties so long as it does not contravene public policy and was not issued in defiance of any statutory prohibition." The principle thus announced will undoubtedly apply where the contract has been wholly executed.

We do not find any error in this cause, and think the judgment and order appealed from should be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order are affirmed.

MR. JUSTICE HOLLOWAY, being disqualified, takes no part in this decision.

YORK, RESPONDENT, v. STEWARD ET AL., APPELLANTS.

(No. 1,898.)

(Submitted April 30, 1904. Decided May 9, 1904.)

Continuance — Engagements of Counsel — Affidavits—Sufficiency.

Where it appeared from the record that defendant had three counsel, two of whom were partners, an affidavit for a continuance until after a certain date, which stated that counsel who was to try the case was to be engaged in the supreme court on the day set for trial and the two following days, but which failed to show any reason why his partner could not attend to the business in the supreme court, or why the other counsel could not try the case, was insufficient to show error in the refusal of the continuance.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

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ACTION by J. J. York against John M. Steward and another, doing business as the Smith Piano Company. From a judgment for plaintiff, defendants appeal. Affirmed.

Mr. George F. Shelton, and Mr. John J. McHatton, for Appellants.

The rights of the defendants having been saved in their bill of exceptions, the proper method for a review of the action of the court in refusing to grant the continuance is by an appeal from the judgment. (*Haraszthy v. Horton*, 46 Cal. 545; *Jaffe v. Lilienthal*, 101 Cal. 175, 35 Pac. 636; *Whitefoot v. Leffingwell*, 90 Wis. 182; *Sherman v. Higgins*, 7 Mont. 479; *Barber v. Briscoe*, 8 Mont. 214.)

Absence of sole counsel in case is a ground for a continuance, and the refusing thereof, upon a proper showing, is reversible error. (*January v. Superior Court*, 73 Cal. 540; *Bartel v. Tie-man*, 55 Ind. 438; *Bates v. Commonwealth* (Ky.), 16 S. W. 528; *Allen v. Pollock* (Ky.), 22 S. W. 436; *Ross v. Head*, 51 Ga. 605; *Summerlyn v. Dent*, 36 Ga. 54; *Smith v. Brand*, 44 Ga. 588; *Bagwell v. State*, 56 Ga. 406; *Truelock v. State*, 1 Iowa, 515; *Barry v. Louisiana Ins. Co.*, 12 Martin, 484; *Hill v. Clark*, 51 Ga. 122; *Rossett v. Gardner*, 3 W. Va. 531; *Peterson v. Atlantic City R. Co.*, 177 Pa. St. 335; *Watkins v. Manufacturing Co.* (Ky.), 38 S. W. 868; *Bibb Lumber Co. v. Lima Machine W. Co.*, 98 Ga. 279, 25 S. E. 445; *State v. Ferris*, 16 La. Ann. 424; *State v. Boys*, 37 La. Ann. 481; *Harrigan v. Turner*, 53 Ill. App. 292; *Myers v. Trice*, 86 Va. 835; *Moulder v. Kempff*, 115 Ind. 459; *Rhode Island v. Massachusetts*, 36 U. S. (11 Pet.) 226; *Green v. Culver* (Ky.), 39 S. W. 426; *Rice v. Melendy*, 36 Iowa, 166.)

Mr. Charles O' Donnell, for Respondent.

Mr. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought by the plaintiff to recover a judgment against the defendants for a balance alleged to be due the plaintiff for rent of certain premises in the city of Butte. The plaintiff had verdict and judgment. The defendants have appealed.

On April 26, 1902, the calendar was called by the district court of Silver Bow county for the purpose of setting causes for trial. At that time this cause was set for hearing on May 5th following. When this day was fixed, John W. Cotter, Esq., one of counsel for defendants, asked the court to set the cause at a date later than May 7th; the reason for his request being that he would be obliged to be in attendance upon the supreme court of the state of Montana on May 5th, 6th and 7th, and could not be present in person to try the cause at an earlier date than May 8th. This request the court refused to grant in the absence of a showing made by counsel by affidavit. On April 30th Mr. Cotter presented and filed his affidavit, and moved the court for a continuance of the cause until after May 7th. After consideration, the motion was denied. The only error assigned in the brief of counsel is the action of the court in refusing the application for a continuance. The affidavit, omitting the formal parts, is the following: "John W. Cotter, being first duly sworn, deposes and says that he is attorney for the defendant in the above-entitled cause, and was such attorney in said cause on the former trial thereof, and represented the said defendant on the appeal thereof in the supreme court; that said court reversed the judgment which had heretofore been obtained by the plaintiff against the said defendant, said cause having been tried before Honorable John J. McHatton, judge presiding in Department 1 of the district court at that time; that this affiant is the only person connected with the case who is qualified to represent the defendant, and that he is obliged to be in attendance upon the supreme court of the state of Montana on Monday, the 5th day of May, Tuesday, the 6th day of May, and Wednesday, the 7th day of May, and that he cannot be present and try the said cause at the time it is set; that he called the

matter of his being required to appear before the supreme court to the attention of this honorable court at the time this cause was set, and was notified by said court to make a showing of such attendance. * * *

It appears elsewhere in the record that there were associated in the cause with the counsel who made the application John J. McHatton and George F. Shelton. It appears further that Mr. Shelton attended the trial, and acted as counsel for the defendants. It further appears that Messrs. McHatton and Cotter were associated in a copartnership as attorneys and counselors. So far as the affidavit shows to the contrary, Mr. McHatton was as well qualified to attend to the business pending in the supreme court as was Mr. Cotter himself, and was at liberty to do so, for there is no statement that the business pending there was of such a character as to demand the personal presence of Mr. Cotter. And while Mr. McHatton could not properly appear and try the cause in the district court, for the reason that he had at one time sat as judge in the cause, yet he could with propriety have relieved Mr. Cotter from the necessity of attending the supreme court, and allowed him to give his personal attention in aid of Mr. Shelton at the trial. Nor does it appear that Mr. Shelton was not as well qualified to attend to the trial as was Mr. Cotter; and, though it does appear that Mr. Cotter would have preferred to be present and try the cause, from the fact that he had been associated with it from the beginning, the affidavit fails to reveal any legal reason why the court erred in setting the cause and requiring the trial to be had as it did. The appeal is without merit.

The judgment is affirmed.

Affirmed.

YORK, RESPONDENT, v. STEWARD ET AL., APPELLANTS.

(No. 1,902.)

(Submitted April 30, 1904. Decided May 9, 1904.)

New Trial—Motion—Bill of Exceptions—Transcript of Evidence—Notes of Official Stenographer — Notes of Private Stenographer.

1. In making up statements or bills of exceptions, litigants are under no obligation to use only the transcript of the evidence furnished by the official stenographer. They may for that purpose use the notes of any person which furnish a correct narrative of the proceedings.
2. A bill of exceptions or statement once settled and filed becomes a part of the record, not subject to correction, except upon a showing that some mistake has been committed, in which case it should be corrected, and not stricken from the files.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

ACTION by J. J. York against John M. Steward and another, doing business as the Smith Piano Company. From an order striking a statement and bill of exceptions from the files, and dismissing a motion for a new trial, defendants appeal. Reversed.

Mr. George F. Shelton, and Mr. John J. McHatton, for Appellants.

Mr. Charles O'Donnell, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought to recover a judgment against the defendants for a balance alleged to be due the plaintiff for the rent of certain premises in the city of Butte. Verdict and judgment were for the plaintiff. Defendants moved for a new trial, alleging as grounds therefor that the court misdirected

the jury, that the evidence is insufficient to justify the verdict, and that the verdict is against law.

Within the time allowed by the statute after notice of intention was served and filed, defendants prepared and served upon counsel for plaintiff their bill of exceptions and statement of the case. Certain amendments were proposed by counsel for the plaintiff, and accepted by the movants. Thereupon the amended statement and bill were presented to the judge for settlement, and were settled and filed with the clerk; the certificate being as follows: "I hereby certify that the foregoing statement on motion for a new trial in the above cause is correct, and the same is hereby settled, allowed and ordered filed in the cause." Thereafter, on motion of counsel for plaintiff, the court entered an order striking the statement and bill from the files, and dismissing the motion for a new trial, on the ground that the bill and statement did not contain "a true and correct transcript of the evidence heard at the trial." From this order, defendants have appealed:

At the hearing on the motion, and in support of it, it was made to appear that counsel for defendants had incorporated in the statement and bill of exceptions a transcript of the evidence obtained from some other person than the official stenographer, instead of a transcript prepared by him from his notes. This fact, made to appear by the testimony of the official stenographer, was the sole ground of the motion, and the basis of the action of the court, though it also appeared from this witness' statement that the transcript was substantially correct. The court proceeded upon the theory that, in the preparation of bills of exceptions and statements, the parties must use transcripts of the evidence furnished by the official stenographer, and that he is the only source from which they may be obtained. This view is erroneous. The duties of the official stenographer are prescribed in the Code of Civil Procedure (Sections 370-377). While he is required to attend all sittings of the court, and to take full notes of all proceedings had thereat, and must file with the clerk his notes of such proceedings,

besides an extended copy of the rulings, decisions and opinions of the court, and the exceptions taken during the trial, which, together with any copies furnished by him to the parties or their counsel, is deemed *prima facie* correct, no obligation rests upon litigants to resort to him as the only authentic source from whom such copies may be obtained. The right to rely upon him is granted under these provisions of the statute, and he may be compelled to perform the resulting duty to furnish copies upon proper application (*State ex rel. Kranich, v. Supple*, 22 Mont. 184, 56 Pac. 20; *State ex rel. Dempsey v. District Court*, 24 Mont. 566, 63 Pac. 389; *State ex rel. Donovan v. Ledwidge*, 27 Mont. 197, 70 Pac. 511); yet there is no provision therein requiring the parties to use such copies only. Counsel may take their own notes, or for that purpose have in attendance their private stenographer. The only obligation resting upon them is to furnish a correct narrative of the proceedings. This the judge may require, or, upon failure, refuse his certificate. It is his duty, however, to examine the bill or statement when submitted to him, and to settle it by his certificate after he has stricken out all redundant matters, and ascertained to his own satisfaction that it truly represents the objections and exceptions as briefly as may be (Code of Civil Procedure, Sec. 1155), or presents a true statement of the case (Code of Civil Procedure, Sec. 1173). After a bill or statement is once settled and filed, it becomes a part of the record, not subject to correction, except upon a showing that some mistake has been committed in it, whereby it fails to present the truth. In such case it should be corrected, and not stricken from the files. No showing was made in support of the motion that the bill and statement do not speak the truth. On the contrary, it appeared to be substantially correct. The court had no power to strike it from the files. (*Beach v. Spokane R. & W. Co.*, 25 Mont. 367, 65 Pac. 106.)

Nor should the motion have been dismissed. The defendants had a right to have the motion considered by the court and de-

cided upon the record as made up. To strike out the statement and dismiss the motion was tantamount to a denial of the motion without giving the movants an opportunity to be heard. A similar situation was presented in *Beach v. Spokane R. & W. Co.*, *supra*. In that case the court, on motion of counsel, struck out the statement on the ground that it had not been served in time, and denied the motion for a new trial. Upon appeal this court held that the action of the district court in the premises was fundamentally erroneous, and that the order striking out the statement vitiated the order denying a new trial. The cause was remanded to the district court, with directions to restore to the files the statement on motion for new trial, and to proceed to hear and determine the motion as made. The discussion in the opinion in that case is wholly applicable to the facts of this case.

The order striking the statement from the files is reversed. The order of dismissal is set aside, and the cause is remanded, with directions to the district court to restore the statement to the files, and to hear and determine the motion for new trial.

Reversed and remanded.

SCHILLING, RESPONDENT, v. CURRAN, SHERIFF, APPELLANT; RYMAN, INTERVENER AND APPELLANT.

(Nos. 1,836, 1,837.)

(Submitted March 24, 1904. Decided May 16, 1904.)

Bankruptcy—Fraudulent Transfers—Bona Fide Purchasers—Good Faith—Present Consideration—Insolvency of Debtor—Presumptions—Findings—Appeal—Specification of Errors—Insufficiency of Evidence—Errors of Law—Sufficiency of Specification—Briefs—Trial—Order of Testimony—Discretion of Trial Court—Reopening of Case—Offers to Prove.

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1. Under Code of Civil Procedure, Section 1173, a specification in the statement that the court erred in making a certain finding, "there being insufficient evidence to justify said finding, and the evidence being insufficient to support the same, and said finding is contrary to the evidence, and wholly unsupported thereby," is not a proper specification of the insufficiency of the evidence.
2. Where the notice of intention to move for a new trial bases the motion on the ground of insufficiency of the evidence to support certain findings, the movant cannot, on appeal, change his position, and claim that the making of the findings was an error at law.
3. Under Code of Civil Procedure, Section 1173, a specification in the statement that the court erred in making a certain finding of fact, "there being insufficient evidence to justify said finding, and the evidence being insufficient to support the same, and said finding is contrary to the evidence and wholly unsupported thereby," is insufficient to charge error in law.
4. Under Code of Civil Procedure, Section 1173, a statement which does not specify the insufficiency of the evidence as a ground of the motion must, at least so far as the insufficiency of the evidence is concerned, be disregarded.
5. Under Code of Civil Procedure, Section 1114, requests for findings made after the filing of the findings and conclusions of law are presented too late, and the want of such findings cannot be made a ground for reversal.
6. Under Bankruptcy Act of July 1, 1898, a sale by a bankrupt, though made to hinder and defraud creditors, is not void as against a purchaser who did not participate in the fraudulent act of the bankrupt, or have knowledge of such intent or of the bankrupt's insolvency, and who bought not for a cancellation of an antecedent debt or a payment of a merely nominal price, but one which, under the circumstances, was present and fair.
7. Under Bankruptcy Act of July 1, 1898, the insolvency of a debtor, to avoid a transfer, must be one existing at the date thereof, and not one arising thereafter.
8. In proceedings by a trustee in bankruptcy to recover property of the bankrupt sold within four months prior to the filing of the petition, where the pleadings contained no allegation of insolvency at the date of the transfer of the property, and the record did not disclose any facts tending to show the same, the supreme court will presume that on the date of the transfer the debtor, subsequently adjudged a bankrupt, was solvent.
9. Where, at the time of a sale of property, debtors were presumably solvent, and a person, in good faith and for a valuable consideration, purchased certain property of them, and possession was turned over to him, as required by the state statutes, the sale was not null and void as against the creditors of the debtors by the laws of the state; and hence the property could not be recovered under Bankruptcy Act of July 1, 1898, for the benefit of the debtors' creditors, on the debtors being subsequently adjudged bankrupt.
10. In proceedings by a trustee in bankruptcy, to recover property sold by the bankrupt within four months prior to the filing of the petition, where the court found that the property was purchased in good faith, without any intent to hinder, delay or defraud creditors of the bankrupt, the purchaser paying therefor in cash a certain sum, and found, as a conclusion of law, that he was a *bona fide* purchaser for a present fair consideration, a further finding of fact as to whether the purchase was made for a present fair consideration was unnecessary.
11. In proceedings by a trustee in bankruptcy to recover property sold by the bankrupt within four months prior to the filing of the petition, a finding of fact as to whether the property was sold within four months preceding the date of the adjudication in bankruptcy was unnecessary, where it was undisputed on the trial that the sale was made on June 2d, and that the adjudication was made on July 18th of the same year.

12. An offer to prove is not sufficient, without having the witness present and calling him, or asking leave to call him, or without affirmatively showing that the offer is made in good faith, and with the means of doing or trying to do what is desired.
13. The reopening of a party's case, after he has closed it, for the purpose of admitting further testimony, is in the discretion of the court below, and will not be disturbed on appeal unless abuse of discretion is shown.
14. Where counsel for defendant had, in his case in chief, introduced evidence bearing on the connection of plaintiff with the fraudulent acts of a debtor, it was his duty to have completed his showing in that regard before he closed his case, and it was proper to refuse to allow him to reopen it for the purpose of introducing further evidence on that subject.
15. The mere fact that an objection made to an offer of proof is not good does not prevent the court from exercising its discretion and refusing to allow the offered proof.
16. In proceedings by a trustee in bankruptcy to recover from the purchaser property sold by the bankrupt within four months prior to the filing of the petition, testimony that the bankrupt secreted the money he received from the sale for the purpose of defrauding his creditors, being in reference to a transaction occurring after the sale, and payment of the money, in which it was not claimed that the purchaser participated, was not competent for the purpose of showing any participation by him in the fraudulent intent of the bankrupt, or that he had knowledge of such fraudulent intent at the time of the sale.
17. Where a finding on the value of property in dispute was made, and not objected to, and the sufficiency of the evidence is not brought before the supreme court for consideration, that court will presume that the finding was sustained by the evidence, and will not consider a contention that the judgment is excessive.
18. Under the Rules of the Supreme Court, errors not specified in the brief will not be considered.

Appeal from District Court, Missoula County; F. C. Webster, Judge.

ACTION by E. W. Schilling against D. T. Curran, as sheriff of Missoula county; J. H. T. Ryman, trustee in bankruptcy, interevener. From a judgment for plaintiff, and from orders denying a new trial, defendant and intervener separately appeal. Affirmed.

Mr. A. L. Duncan, Messrs. Nolan & Loeb, Mr. Joseph M. Dixon, and Mr. Frank Woody, for Appellants.

Messrs. Joyce & Mulroney, Messrs. Hall & Patterson, Mr. S. G. Murray, and Mr. Charles H. Hall, for Respondent.

MR. COMMISSIONER CLAYBERG prepared the following opinion for the court.

Respondent claims that he purchased certain personal property, goods, wares and merchandise, from the firm of Pulley & Ludwick on June 2, 1900, for \$950 cash, and took possession of the same; that on June 4, 1900, appellant Curran, as sheriff of Missoula county, levied upon and took into his possession all of said property.

On June 21, 1900, respondent brought suit against the sheriff to recover the possession of said personal property. It appears from the answer of the sheriff that on July 18, 1900, Pulley & Ludwick were, upon the application of some of their creditors, declared bankrupt by the United States district court for the district of Montana; that on the 8th day of August, 1900, one J. H. T. Ryman was duly appointed trustee in bankruptcy of the estate of Pulley & Ludwick, and qualified as such; that soon thereafter he demanded of the sheriff all of the personal property, goods, wares and merchandise which he had taken from plaintiff; that the sheriff complied with this demand early in September, 1900; that a writ of attachment was issued against the property of Pulley & Ludwick, in a suit instituted against them by the Western Montana National Bank of Missoula, to recover the sum of \$1,099.68, exclusive of interest. Curran, the sheriff, claimed justification for the seizure of the goods by virtue of a levy thereon under such writ of attachment as the property of Pulley & Ludwick. To this answer respondent filed a reply on April 13, 1901, admitting the allegation that Pulley & Ludwick were partners, and denying all the other allegations. On March 22, 1901, Ryman, as trustee in bankruptcy, by leave of the lower court, filed his complaint in intervention in this suit; claiming, as such trustee, all the property seized by the sheriff, as above stated. On September 11, 1901, respondent filed his answer to this complaint of intervention; denying practically all the allegations thereof, except that Pulley & Ludwick were partners.

The case was tried upon these pleadings by the court without a jury, and resulted in a judgment in favor of respondent against Curran, the sheriff, for \$247.55 damages for detention

of the property, \$47.60 costs, and return of the property, and, in case return could not be had, the sum of \$1,805.55, the value thereof.

The court, prior to the entry of this judgment, made and filed thirteen findings of fact, and four conclusions of law, which findings, in substance, in so far as they are important upon these appeals, are as follows: (1) That Pulley & Ludwick were partners in the mercantile business at Missoula on the 2d day of June, 1900. (2) That on that day respondent purchased of said Pulley & Ludwick the merchandise for which he brought suit. (3) That he took possession of the same. (4) That he also purchased some store fixtures, and took possession of the same. (5) That this property so purchased by him, together with some property of his own, was of the value of \$1,805.55. (6) That on June 4, 1900, the sheriff attached, and took from the possession of the respondent, all such property. (7) That the writ of attachment under which the sheriff acted was directed against the property of Pulley & Ludwick, and not against the property of respondent. (8) That upon the 18th day of July, 1900, Pulley & Ludwick were adjudged bankrupts, and that on August 8, 1900, Ryman was appointed as trustee in bankruptcy, and duly qualified as such. (9) That, as such trustee, Ryman demanded of the sheriff the merchandise so taken from respondent, which was thereupon delivered to said trustee, and that thereafter the trustee filed his complaint in intervention, claiming the property in the suit to be the property of the bankrupt estate. (10) That the property seized by appellant was not the property of the bankrupt estate of the firm of Pulley & Ludwick, but was the property of respondent. (11) That respondent and Pulley & Ludwick at the time of the sale stood on equal footing, and no confidential relations existed between them. (12) That the purchase by respondent was made in good faith, and without any intent to hinder, delay or defraud the creditors of Pulley & Ludwick, or any of them. (13) That respondent purchased the said merchandise and personal property in good faith, paying therefor in cash the sum of \$950.

The conclusions of law based upon these findings of fact were: (1) That the respondent herein was the owner of all the property taken by the defendant (appellant) under the writ of attachment against Pulley & Ludwick, and was entitled to have the property returned to him, or, in the event it could not be returned, to receive the sum of \$1,805.55, with interest thereon from the 4th day of June, 1900. (2) That the court has jurisdiction to entertain an action or defense by a trustee in bankruptcy, and that a trustee in bankruptcy has the legal right to file his complaint in intervention. (3) That respondent was a *bona fide* purchaser in good faith, for a present fair consideration, of the stock of merchandise and personal property purchased of said firm of Pulley & Ludwick. (4) That the costs of the action should be paid by defendant.

After these findings and conclusions were filed, defendant, Curran, and intervener, Ryman, jointly filed exceptions to certain thereof. They also filed requests for further findings of fact, which are hereinafter quoted. These exceptions were only directed to the sufficiency of the evidence to support the findings. The court thereafter overruled the exceptions, and refused to make the further findings requested. No findings were requested by either party at the time of the argument and submission of the case.

Defendant Curran and the intervener each made separate motions for a new trial, which were denied, and each appealed from the order denying them. They also separately appealed from the judgment, and filed in this court separate records and briefs upon such appeals. The appeals are numbered 1,836 and 1,837. The cases were argued and submitted together, and will be decided together; following the practice in *Murray v. Polglase*, 23 Mont. 401, 59 Pac. 439.

Counsel for respondent objects to a consideration of the questions sought to be raised as to the insufficiency of the evidence to sustain the findings, because the record does not disclose that it contains all the evidence. It is very questionable, under the decisions of this court in the case of *State v. Shepphard*, 23

Mont. 323, 58 Pac. 868, and subsequent cases, as to whether this objection is not well taken; but, inasmuch as the statement and record must, for other reasons, be disregarded in so far as the insufficiency of the evidence is concerned, we have not considered, and do not pass upon, this question.

Section 1173, Code of Civil Procedure, provides: "When the notice of the motion designates as the ground of the motion the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient. When the notice designates as the ground of the motion errors in law, occurring at the trial and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely. If no such specifications be made the statements shall be disregarded on the hearing of the motion."

The statements on motion for new trial do not contain any specifications of the insufficiency of the evidence, as required under the above section. We find, however, in such statements, the following: "Assignment of Errors. (1) The court erred in making finding of fact No. 2, made and filed in said cause, there being insufficient evidence to justify said finding, and the evidence being insufficient to support the same; and said finding No. 2 is contrary to the evidence, and wholly unsupported thereby." Counsel then recite the evidence bearing upon finding No. 2. The second, third, fourth and fifth points urged are identical with the language above quoted. No one of these can possibly be construed into a specification of the insufficiency of the evidence. Insufficiency of the evidence is an error of fact. Here the errors were attempted to be charged as errors of law. Practically the same specifications are found in the record in the case of *Bardwell v. Anderson*, 18 Mont. 528, 46 Pac. 443, and they were held to be insufficient. The same doctrine is held under statutes similar to ours in the following cases: *Smith v. Christian*, 47 Cal. 18; *Cunnington v. Scott*, 4 Utah, 446, 11 Pac. 578; *State of Utah v. Spencer*, 15 Utah, 149, 49

Pac. 302; *Heilbron v. Irrigation Ditch Co.*, 76 Cal. 8, 17 Pac. 932.

The notices of intention to move for new trial, contained in the record, base the motions for new trial upon the ground of insufficiency of the evidence to support findings Nos. 2, 10, 11, 12 and 13, and do not allege any error at law on the part of the court in making these findings. Counsel cannot change his position, and now claim that the making of these findings is an error at law. Under *Bardwell v. Anderson*, *supra*, such specifications are also insufficient to charge errors of law.

Under Section 1173, *supra*, the court below should have disregarded the statements on motion for new trial in so far, at least, as the insufficiency of the evidence was concerned. It is also clear that the same must be disregarded here. This court has said: "The specifications having wholly failed to point out any particulars in which the evidence is insufficient to support the verdict, we are bound, by the terms of Section 1173, above, to disregard them on this hearing." *Cain v. Gold Mountain Mining Co.*, 27 Mont. 529, 71 Pac. 1004.)

Counsel for appellant insists that the court did not make findings upon all the material issues raised by the pleadings, but refused to make findings thereon, although requested so to do by appellants. The record discloses that the only requests for findings by appellant were made after the findings and conclusions of law made by the court were filed with the clerk. Section 1114, Code of Civil Procedure, provides: "No judgment shall be reversed on appeal for want of findings at the instance of any party who, at the close of the evidence and argument in the cause, shall not have requested findings in writing and had such request entered in the minutes of the court."

Appellants' requests were presented too late, and the judgment cannot be reversed by this court for want of findings.

But again, an examination of the record discloses that, of the three findings requested by appellant, one was upon an immaterial issue. Upon the others, findings were made in effect.

The first request of appellant was as follows: "Request a finding of fact on the issue as to whether or not Pulley & Ludwick were indebted to divers and sundry persons at the time of the alleged sale of the merchandise and personal property by them to the plaintiff, and whether or not said sale was made by Pulley & Ludwick with the intent and purpose in them (Pulley & Ludwick) to hinder, delay or defraud their creditors, or any of them." The finding of fact herein requested was not material to the decision as made by the court. It might have been material as a step in the conclusion of the court, if the court had found that the respondent herein participated in the fraudulent intent of Pulley & Ludwick, or had knowledge thereof, and was not a purchaser in good faith for a present fair consideration.

Subdivision "e" of Section 67 of the Bankrupt Act of July 1, 1898, c. 541, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), reads as follows: "That all conveyances, transfers, assignments or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this Act subsequent to the passage of this Act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration. * * * And all conveyances, transfers or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the state, territory or district in which such property is situate, shall be deemed null and void under this Act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt." Under the first part of Subdivision "e" a sale by the bankrupt is not null and void as against purchasers in good faith and for a present

fair consideration. A purchaser in good faith must be one who did not participate in the fraudulent intent or act of the bankrupt in making the sale, or have knowledge of such intent. If he had knowledge of the insolvency of the bankrupt, and bought the property with the intention and for the purpose of aiding the bankrupt in defrauding creditors, he would not be a purchaser in good faith. He must also be a purchaser "for a present fair consideration." For example, if the purchaser took the property in payment of an antecedent debt, he would not be a purchaser for a present fair consideration. If he paid but a nominal sum for property of great value, he would not be a purchaser for a present fair consideration; but the meaning of the words "present fair consideration" must be determined from all the facts and conditions surrounding the purchase, and, if the price was paid in cash, and an amount equal to the fair value of the goods, under all the circumstances, the consideration would be present and fair.

Under the last above quoted part of Subdivision "e," the bankrupt must be insolvent. We find no allegation of insolvency of Pulley & Ludwick in any of the pleadings in this case. So far as the pleadings are concerned, Pulley & Ludwick might have been entirely solvent on the 2d day of June, 1900, the date of the sale, and might have had sufficient funds on hand and in their possession to pay every dollar of their indebtedness. Insolvency must exist at the date of the purchase, and not arise thereafter. Of course, we understand that Pulley & Ludwick were adjudged insolvent on the 18th day of July, when they were declared bankrupt; but, without allegations in the pleadings and proof in the record that this insolvency existed at the date of the sale, no presumption can be indulged that such was the fact. The pleadings being barren of any allegation of such insolvency, and the record not disclosing any facts tending to show the same, this court must presume, for the purposes of this case, that on the 2d day of June, 1900, the date of the sale, Pulley & Ludwick were solvent. If they were then solvent, and appellant, in good faith and for a valuable consideration, pur-

chased the property in question, and the possession of the same was turned over to him as required by the statute of the state, such sale would not be null and void, as against the creditors of Pulley & Ludwick, by the laws of the state in which the property was situated. So that the mere fact that Pulley & Ludwick intended by the sale in question to hinder, delay and defraud their creditors, or any of them, is entirely immaterial, under the findings and conclusions of the court, as the court found that respondent was a *bona fide* purchaser for a present fair consideration. (*Grunsky v. Parlin*, 110 Cal. 179, 42 Pac. 575; *Jackson v. Glaze*, 3 Okl. 143, 41 Pac. 79; *La Clef v. Campbell*, 3 Kan. App. 756, 45 Pac. 461; *Berlin v. Van De Vanter*, 25 Wash. 465, 65 Pac. 756; *Magee v. Hartzell*, 7 Kan. App. 489, 54 Pac. 129; *Hood v. Gibson*, 8 Kan. App. 588, 56 Pac. 148.)

The second request for finding was as follows: "Request a finding of fact as to whether or not the purchase of said goods, wares and merchandise was made by the plaintiff from said firm of Pulley & Ludwick for a present fair consideration." We think the findings of the court, as made, are conclusive upon this proposition. By finding 12 the court found that the purchase was made in good faith, without any intent to hinder, delay or defraud creditors of Pulley & Ludwick, or any of them. By finding 13 it is declared that respondent purchased the property in good faith, paying therefor in cash the sum of \$950. The court, having found that respondent purchased the property in good faith, and without any intent to hinder, delay or defraud the creditors of Pulley & Ludwick, found, as a conclusion of law, that respondent was "a *bona fide* purchaser in good faith for a present fair consideration."

The third request for further finding was as follows: "Request a finding of fact as to whether or not the merchandise and personal property sold by Pulley & Ludwick to the plaintiff was made within four months immediately preceding the date on which Pulley & Ludwick were adjudged bankrupts, and whether or not such sale was made with the intent and purpose

in said Pulley & Ludwick to hinder, delay or defraud their creditors, or some of them." An examination of the record discloses the fact that the court found that the sale to respondent was made on the 2d day of June, 1900, and that on the 18th day of July, 1900, Pulley & Ludwick were adjudged bankrupts. As a matter of fact, no finding need to have been made upon this proposition, because it was undisputed on the trial of the case that the sale was made on the 2d day of June, and that Pulley & Ludwick were adjudged bankrupt on the 18th day of July, 1900.

Counsel for appellant Curran further assigns as error the refusal of the court to permit him, after he had closed his case, and the intervener had commenced the introduction of his testimony, to reopen it, and "go into the question of fraud, and now makes formal offer to prove that E. W. Schilling (respondent) knew of this fraudulent transaction; that he did not buy for a fair consideration." This offer was properly denied. An offer to prove is not sufficient, "without having the witness present and calling him, or asking leave to call him, or without affirmatively showing that the offer is made in good faith, and with the means of doing or trying to do what is desired." (*State v. Bowser*, 21 Mont. 133, 53 Pac. 179; *Eschbach v. Hurtt*, 47 Md. 61; *Robinson v. State*, 1 Lea. 673.)

The reopening of a party's case, after he has closed it, for the purpose of admitting further testimony, is in the discretion of the court below, which has charge of the proceedings on the trial. (*Alderson v. Marshall*, 7 Mont. 288, 16 Pac. 576.) The ruling of the court on such matters will not be disturbed by this court unless there is a clear abuse of discretion. As above stated, the defendant had closed his case, and the intervener had commenced the introduction of his testimony, when counsel for defendant interrupted the proceedings, and made the offer above specified. Defendant's counsel did not again call this matter to the attention of the court after the close of intervener's testimony, or after the close of all testimony offered in the case. Again, an examination of the record discloses the fact

that counsel for defendant had already, in his case in chief, introduced evidence bearing upon the connection of Schilling with the alleged fraudulent action of Pulley & Ludwick, and it was his duty to have completed his showing in that regard before he closed his case. It would be very easy for counsel to inject error in a record, if, after he had closed his testimony, he should offer to make proof in his client's favor as to some material issue in the case, well knowing his utter inability to make proof thereof, if he could be allowed to assign error upon the action of the court in overruling the offer. We do not believe that the court abused its discretion in refusing to allow defendant's case to be reopened. The mere fact that the objection made to the offer by defendant's counsel was not good did not prevent the court from exercising its discretion and refusing to allow the offered proof. We therefore are of the opinion that there was no error committed in this regard.

Counsel for Ryman, appellant, alleges error on the ruling of the court in sustaining the objection of counsel for plaintiff to the introduction of the evidence of certain witnesses to prove that Pulley & Ludwick, instead of paying the money received from respondent on this sale, secreted it in an outhouse on the premises where they resided, for the purpose of defrauding their creditors. We do not think any error was committed in this regard. It was in reference to a transaction occurring after the sale and payment of money, in which it is not claimed that the respondent participated. It was not competent for the purpose of showing any participation of the respondent in the fraudulent intent of Pulley & Ludwick, or that he had knowledge of such fraudulent intent at the time of the sale. It probably would have been admissible to the extent of showing the fraudulent intent of Pulley & Ludwick in making the sale, but, as we have heretofore seen, such intent would not be sufficient to set aside the sale.

Counsel for appellant Curran made quite an elaborate argument based upon the theory that the judgment is excessive, at least in the sum of \$600. This point cannot be considered, for

the following reasons: Finding No. 5 made by the court is as follows: "That the said stock of merchandise and store furniture and personal property purchased by the plaintiff from the said firm of Pulley & Ludwick, together with the remnants of the other stock of merchandise, were and are of the value of one thousand eight hundred and five (\$1,805.55) dollars and fifty-five cents." No exceptions or objections to this finding were made by counsel for defendant, but, on the contrary, they excepted to finding No. 13 on the ground, among others, that such a finding was inconsistent with this finding No. 5. The finding having been made by the court, and the sufficiency of the evidence not being before us for consideration, and the finding not being objected to in any manner by counsel for defendant, we must presume that it is sustained by the evidence. But again, paragraph "b," subd. 3, Rule X, of the rules of this court provides that the brief shall contain "a specification of errors relied upon, which shall be numbered and shall set out separately and particularly each error intended to be urged." An examination of the briefs discloses no specification of error in this regard. This court has frequently held that no errors will be considered unless specified in the brief. (*Anderson v. Cook*, 25 Mont. 330, 64 Pac. 873, 65 Pac. 113; *Sweeney v. Montana Central Ry. Co.*, 25 Mont. 543, 65 Pac. 912; *Hayes v. Union Merc. Co.*, 27 Mont. 264, 70 Pac. 975.) We therefore cannot enter into the consideration of this question.

We are satisfied that the findings of the court were full and effective upon all material issues raised by the pleadings in the case, and that the conclusions of law as made by the court, and the judgment as entered by him, are fully sustained by the findings.

We therefore advise that the judgment and orders appealed from be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgments and orders are affirmed.

LEGGAT ET AL., APPELLANTS, v. CARROLL, RESPONDENT.

(No. 1,869.)

(Submitted April 22, 1904. Decided May 16, 1904.)

Water Rights—Ownership—Burden of Proof—Appurtenances—Evidence.

1. Where plaintiffs, in an action to recover damages for the diversion of water adjacent to their mining claim, allege ownership of their right to use the water, the burden of proof is on them to show ownership, on denial of the allegation by defendant.
2. Mere proof of ownership of an interest in a placer mining claim is insufficient to show an ownership of the right to use the waters adjacent thereto.
3. No water right can become appurtenant to lands unless the ownership of the water right and the ownership of the lands was in the same person or persons.
4. In an action to recover damages for the diversion of water adjacent to plaintiffs' mining claim, testimony tending to show that the claim could not be worked as a placer mining claim successfully without sufficient volume of water to enable hydraulic mining to be done on it is immaterial, in the absence of proof of ownership by plaintiffs of the right to use the water.
5. Where plaintiffs, in an action to recover damages for the diversion of water adjacent to their mining claim, offered to show, by the person who obtained the patent from the government for the claim, that he described in his application, as one of the improvements entitling him to a patent, a ditch, which was the same as that in which the water involved in the action was located, to which objection was made and sustained, whereupon plaintiffs offered a certified copy of the patent, they thereby waived any error in the exclusion of the testimony.
6. Where plaintiffs, in an action to recover damages for the diversion of water adjacent to their placer mining claim, offered in evidence a certified copy of the application for a patent to the claim, which was excluded, the ruling of the court in excluding it cannot be considered on appeal in the absence of the application from the record.
7. The lease of a placer mining claim including the right to use thereon "the Mammoth ditch and water right, and all water and water rights heretofore used with or appurtenant to said premises," has no tendency to show that the Mammoth water right was appurtenant to the leased premises.
8. The testimony of a witness on a former trial is inadmissible in the absence of a showing that it was given in an action between the same parties relating to the same matter.

Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

ACTION by Ruth F. Leggat and others against Eugene Carroll, receiver of the Butte City Water Company. From a judg-

ment for defendant, and from an order overruling their motion for a new trial, plaintiffs appeal. Affirmed.

Mr. George A. Clark, and Messrs. Carpenter, Day & Carpenter, for Appellants.

Messrs. Forbis & Evans, and Mr. C. P. Drennan, for Respondent.

MR. COMMISSIONER CLAYBERG prepared the following opinion for the court:

Plaintiffs appeal from a judgment of nonsuit entered against them, and from an order overruling their motion for a new trial.

The action was brought to recover damages against defendant for a diversion of water, and to procure an injunction against further diversion. Plaintiffs alleged ownership of the right to the use of one-eighth of the waters of Mammoth creek. This was denied by defendant. The burden of proof upon the issue thus raised was upon plaintiffs. Proof by them of their allegations in this regard was the initial step in the trial of the case. After hearing all of plaintiff's evidence, the court, on motion of defendant, granted judgment of nonsuit. If plaintiffs offered any evidence tending to prove their right to the use of the water as alleged, the nonsuit should not have been granted. If, on the other hand, no such testimony was offered by plaintiffs, they were not entitled to any relief, and no error was committed by the court in sustaining the motion for nonsuit.

Plaintiffs were the owners of an undivided one-eighth interest in the Highland placer claim, and insist that the waters of Mammoth creek were appurtenant to this placer claim, and that, therefore, they were entitled to the use of one-eighth of such waters. No allegation was made or proof offered of any conveyance or transfer of this water right to plaintiffs, or of any appropriation thereof by them personally, or of any such adverse user as would pass title to them by prescription.

The proofs disclose the following condition as to this water: In 1883 one R. D. Leggat located the Highland placer claim in behalf of himself and seven others, one of whom was plaintiff's predecessor in interest. Each of the locators was entitled to a one-eighth interest in the claim. A few days later the same R. D. Leggat initiated an appropriation of 1,500 inches of the waters of Mammoth creek in his own name, and afterwards completed the appropriation by diversion and use. R. D. Leggat, at the time of the initiation of this appropriation, was the owner of and entitled to one-eighth interest in the Highland placer claim. He also owned another patented placer claim, and was interested in still another, both of which were adjacent to the Highland placer claim. Soon thereafter he became interested in still other placer claims in this immediate vicinity.

The notice of appropriation reads that "the said waters are claimed and located for the purpose of carrying it in a ditch seven miles to Coolee dry gulch, a tributary of Highland gulch, Silver Bow county, Montana, and for the purpose of mining with." The proof discloses that a portion of Coolee dry gulch was included in the limits of the Highland placer claim, a portion within the limits of patented placer No. 38, in which Leggat was interested, and a portion entirely outside both of these claims.

Leggatt, the appropriator of the water, was called as a witness for plaintiffs, and testified, among other things, that he appropriated these waters individually and for his own use and benefit, and that in the year 1887 or 1888 he conveyed a certain interest therein to one White, who had paid him a portion of the money which he (Leggat) had expended in making the appropriation of the water; that none of the plaintiffs or their predecessor in interest paid any part of the cost of appropriation or diversion of the waters; that for several years after the appropriation he conducted the waters appropriated across the Highland placer claim and used them upon other claims; that none of the waters so appropriated were ever used by him or

with his consent upon the Coolee diggings. (However, as to this last fact, he was contradicted by other witnesses.) Proof was offered showing that, some time after the appropriation was complete, R. D. Leggat used this water for several years in mining upon the Highland placer claim; but, so far as disclosed by the record, neither of the plaintiffs nor their predecessor in interest had any share or interest in this use or in the mining, nor had they at the time of said use any knowledge thereof. R. D. Leggat was a co-tenant in this claim with the other owners thereof, and had a right to use his own water right in connection therewith, without endangering his right thereto.

Did any of this proof tend to show that the water right thus appropriated by R. D. Leggat was appurtenant to the Highland placer claim? This court has held for many years, by a uniform line of decisions, that a water right is appurtenant to the land upon which it is used. Whatever doubts may exist as to the correctness of this ruling, many conveyances have been made in reliance upon it, and it has therefore become a rule of property, and the doctrine of *stare decisis* must apply.

In order that anything should become appurtenant to land, such thing must be acquired by the owner of the land, or the person contesting such ownership must so have conducted himself in relation thereto as to be estopped from so contesting. No estoppel is pleaded in this case.

As above stated, no claim is made of any acquirement of title to the water right in question, but plaintiffs rest their entire case upon the proposition that, owning one-eighth of the placer claim, they own one-eighth of the water right as being appurtenant to said placer claim. There is an absolute want of proof in the record tending in any wise to support this claim.

The only other errors complained of, which it is necessary to take notice of, are alleged errors upon the introduction of testimony. It is alleged that the court erred in sustaining defendant's objection to the following question asked the witness John B. Leggat: "I will ask you if it is possible to work it as placer mining ground successfully without sufficient volume of water

to enable hydraulic mining to be done upon it?" This question was objected to as incompetent because the witness had not qualified himself, and also on the ground of immateriality. The evident purpose of the question was to show damages caused by the defendant's diversion of the waters of Mammoth gulch, as alleged in the first cause of action in the complaint. Before the testimony sought to be brought out by this question could at all become material, it was necessary for plaintiffs to show that they owned an interest in the right to the water of Mammoth gulch. As we have seen, they gave no testimony tending to show that condition; therefore the testimony thus offered was immaterial. The same remarks apply to errors Nos. 4 and 8.

Error No. 5 was waived. Witness R. D. Leggat was asked the following question: "I will ask you if you did not describe in that application for patent, as one of the improvements entitling you to a patent, a ditch, which was the same as the Mammoth ditch?" This was objected to on the ground that the application was the best evidence, whereupon counsel for plaintiffs made the following offer: "We now offer in evidence a certified copy, certified by the commissioner of the United States land office, of an application for patent signed and verified by Roderick D. Leggat, and dated the 6th day of January, 1885, in which he makes application for patent to the Highland placer." The offer was objected to, and the objection was sustained. By this offer to introduce the application referred to in the question first above specified, plaintiffs' counsel waived the right to insist that the overruling of that question was error. We cannot consider the ruling upon the offer of the application for patent, because the application offered is not contained in the record. (*Haupt v. Simington*, 27 Mont. 480, 71 Pac. 672, 94 Am. St. Rep. 839; *Tague v. John Caplice Co.*, 28 Mont. 51, 72 Pac. 297.)

The next error alleged is the action of the court in sustaining defendant's objection to the offer in evidence of a written lease, dated May 5, 1894, of the Highland placer and other property,

including the right to use the Mammoth ditch and water right, and all water and water rights heretofore used or appurtenant with said leased premises.

It will be noticed, from an examination of this lease, that several placer claims were leased by Rod. D. Leggat and wife, White and wife, Lettellier and wife, to one Petty. After describing the placer claims leased, the lease further provides: "It is also understood and agreed between the parties hereto that said second party shall have the right to use in his mining operations on said leased premises during the continuance of said lease, the Mammoth ditch and water right, and all water and water rights heretofore used with or appurtenant to said leased premises." We do not believe that the provision of this lease, above quoted, in any manner tended to show that the Mammoth water right was appurtenant to the Highland placer claim. The provision above quoted must be so construed as to refer to each of the placer claims mentioned in the lease. No water right could be appurtenant to all these placer claims unless the ownership of the water right and the ownership of the placer claims was in the same person or persons. The record discloses that the ownership of each of the placer claims was in different persons. So far as the language above quoted from the lease is concerned, it may have been intended by the owners of the Mammoth ditch and water right to lease it to the party of the second part as a separate and distinct property. It will be noticed that the language above quoted does not imply that the Mammoth ditch and water right are appurtenant to the leased premises. The language is, "The Mammoth ditch and water right, and all water and water rights heretofore used or appurtenant with said leased premises." We do not think, therefore, that any error was committed by the court in the exclusion of said lease from evidence.

Counsel undertook to introduce, by the testimony of the stenographer of the court, the testimony of witness Vilandry, given in an action brought by plaintiffs against the Butte City Water Company, the judgment roll of which was offered and

received in evidence in this hearing. This was objected to by the defendant as incompetent, immaterial and irrelevant, and that the action was not between the same parties as the parties to this suit, and did not relate to the same matter. There is no doubt but that the evidence was properly excluded, under the statutes of this state, and under the decision in *Reynolds v. Fitzpatrick*, 28 Mont. 170, 72 Pac. 510.

We find no error in the record, and advise that the judgment and order appealed from be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order are affirmed.

SLATER BRICK COMPANY, RESPONDENT, v. SHACKLETON ET AL., APPELLANTS.

(No. 1,890.)

(Submitted April 27, 1904. Decided May 16, 1904.)

Statute of Frauds—Sale of Personalty—Part Performance—Appeal—Findings—Review.

1. Where the record on appeal does not disclose that any findings were requested by either party, or that any were made, all findings necessary to support the judgment are implied.
2. Where the evidence is conflicting, the supreme court on appeal will not disturb the findings of the trial court.
3. Under Civil Code, Section 2340, declaring invalid a sale of personalty for \$200 or more, not in writing, unless the buyer accepts and receives part of the thing sold, the acceptance and receipt need not be concurrent with the purchase.
4. Under Civil Code, Section 2340, making valid a sale of personalty, for \$200 or more, though not in writing, if the buyer accepts and receives part of the thing sold, such acceptance and receipt by one who assumes the buyer's contract is sufficient.

Appeal from District Court, Yellowstone County; C. H. Loud, Judge.

ACTION by the Slater Brick Company against John Shackleton and another, partners as Shackleton & Whiteway. Judgment for plaintiff. From the judgment, and from an order denying their motion for a new trial, defendants appeal. Affirmed.

Mr. O. M. Hall, for Appellants.

There must have been a receipt and acceptance shown to take the case out of the provisions of the statute requiring the contract to be in writing. (Civil Code of Montana, Sec. 2340, Subd. 2; *Shindle v. Houston*, 1 N. Y. 261; *Kirby v. Jonson*, 22 Mo. 354.)

The contract which plaintiff attempted to prove was void—not merely voidable—under our statute. (Civil Code, Sec. 2340; *Teeney v. Howard*, 79 Cal. 525, 21 Pac. 984.)

The defense of the statute of frauds is available under a denial. (*Ryan v. Dunphy*, 4 Mont. 342, 116 U. S. 49.)

The objection that the contract was void under the statute can be raised on this appeal. (*Brandeis v. Muslandel*, 13 Wis. 142.)

If the sample is a mere specimen, its receipt and acceptance will not take the case out of the statute of frauds. (1 Benjamin on Sales, Sec. 141, etc., see note 3 to said section.)

Mr. O. F. Goddard, for Respondent.

MR. COMMISSIONER CLAYBERG prepared the following opinion for the court:

Appeal by defendants from a judgment and order denying their motion for a new trial.

The action was brought to recover a balance claimed to be due for 198,500 brick delivered by plaintiff to defendants. The only question in controversy between the parties is as to the price. Plaintiff claims that it contracted for the sale of the brick to William White & Co. at the price of \$8.50 per

thousand, f. o. b. cars at Billings, and that defendants assumed this contract; that in pursuance of this contract all the brick were delivered, and defendants paid on the purchase price thereof the sum of \$1,100. Defendants deny that they assumed the contract, and claim that they purchased the brick directly from plaintiff at the agreed price of \$10.50 per thousand, f. o. b. cars Ft. Keogh. The case was tried by the court without a jury.

The record does not disclose that any findings were requested by either party, or that any were made. Therefore all findings necessary to support the judgment are implied. (*Yellowstone National Bank v. Gagnon*, 25 Mont. 268, 64 Pac. 664; *Boe v. Hawes*, 28 Mont. 201, 72 Pac. 509.)

One of the errors assigned is insufficiency of the evidence. The evidence is conflicting, and the rule is that this court will not disturb the findings or conclusions of the court in such event. (*Nelson v. Great Northern Ry. Co.*, 28 Mont. 297, 72 Pac. 642; *Ilefferlin v. Karlman*, 29 Mont. 139, 74 Pac. 201; *Butte Mining & Milling Co. v. Kenyon*, 30 Mont. 314, 76 Pac. 696.)

Another assignment of error is that the alleged contract between plaintiff and White & Co. is void under Section 2340 of the Civil Code, because the price of the goods was over \$200, and the contract was not in writing; that none of the goods were accepted and received by White & Co., and no part of the purchase price was paid by them. This defense is unavailing to appellants, as they are estopped from insisting that the contract was void, for the reason that the evidence conclusively shows, and the court must have found, that they have received all the brick and paid \$1,100 on the purchase price. The receipt and acceptance of the property sold need not be concurrent with the time of sale, but may occur at any time thereafter. The court must have found that they assumed the contract with White & Co., and, if that is true, they were simply placed in White & Co.'s shoes in the contract, succeeded to all the rights of White & Co., and are chargeable with all the liabilities of White & Co. towards the plaintiff. If White & Co. had received and ac-

cepted any part of the merchandise, or paid any part of the purchase price thereof, the entire transaction was immediately placed beyond Section 2340, *supra*. If defendants took the place of White & Co., and received and accepted a portion of the goods, paid a portion of the price, the contract was equally placed beyond Section 2340, *supra*.

Other errors assigned are as to the admission of evidence. We have carefully examined each assignment, and are satisfied that all the evidence which was introduced under objection tended to prove the truth of the allegations of the complaint, and was therefore admissible.

We therefore advise that the judgment and order appealed from be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order are affirmed.

MR. CHIEF JUSTICE BRANTLY, not having heard the argument, takes no part in this decision.

GRAHAM, APPELLANT, v. GREAT FALLS WATER
POWER AND TOWNSITE COMPANY
ET AL., RESPONDENTS.

(No. 1,861.)

(Submitted April 20, 1904. Decided May 16, 1904.)

*Public Lands—Pre-emption—Entry—Contest—Cancellation—
Vested Rights—Bona Fide Purchasers—Patents—Equity.*

1. *Held*, that a certain pre-emption entry was never canceled, so as to entitle the contestant to the preferential right to enter the land given to a successful contestant by Act of Congress, May 14, 1880, c. 89, Section 2.
2. The preferential right given to a successful contestant by Act of Congress, May 14, 1880, c. 89, Section 2, was not a property or vested right, nor a right which could be enforced against the government, but a mere privilege of becoming the first entryman.

3. Congress, by the passage of Act March 3, 1891 (26 Stat. 1098), providing for the confirmation of contested pre-emptions in the hands of *bona fide* purchasers, cut off the rights of successful contestants under Act of Congress, May 14, 1880.
4. The land department's finding on the issue as to whether certain persons are *bona fide* purchasers of contested pre-emptions is conclusive on the state courts.
5. The title conveyed by a patent will not be disturbed where the proof of its invalidity is not clear and convincing.
6. In an action for the purpose of having a patentee declared plaintiff's trustee for the land, before plaintiff can prevail, he must not only show that the patentee was not entitled to the patent, but also that he is.
7. Plaintiff in a suit in equity to declare *bona fide* purchasers of a pre-emption to be his trustees, praying that they be decreed to execute and deliver to him a deed therefor free from all incumbrances, predicated on his contest of the original entry, has no equity which will prevail over the title of defendants, where he never made a declaration of homestead as to the contested pre-emption, nor paid any fees for the land, and his good faith in bringing the suit is questionable.

MR. JUSTICE MILBURN dissenting in part.

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

SUIT by James Graham against the Great Falls Water Power & Townsite Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Mr. George M. Bourquin, for Appellant.

Mr. I. Parker Veazey, for Respondents.

MR. COMMISSIONER CALLAWAY prepared the following opinion for the court:

The defendant had judgment below upon the pleadings, and plaintiff has appealed. From the complaint, answer and reply it appears that on February 24, 1883, one Archibald C. Campbell filed in the United States land office at Helena, Montana, a pre-emption declaratory statement upon the southeast quarter of section 10, in township 20 north, of range 3 east of the Montana principal meridian, alleging his settlement thereon as of date February 16, 1883. In the following October he submitted final proof thereon, upon which cash entry No. 1,373, Helena, Montana, series, was made for the land in the local

land office, and on October 17, 1883, he obtained the usual receiver's final receipt therefor. Three days thereafter Campbell sold the land to Timothy E. Collins for \$1,000. Thereafter Collins sold the land to Paris Gibson and Robert Vaughn. Thereafter, and on October 25, 1886, Vaughn conveyed an undivided one-half interest therein to James J. Hill. On February 23, 1887, Gibson and wife conveyed to said Hill their undivided half interest therein; and on July 19, 1887, Hill and wife conveyed the land to the defendant, the Great Falls Water Power & Townsite Company, hereafter to be referred to as the "Townsite Company." The defendant St. Paul, Minneapolis & Manitoba Railway Company is a grantee of the defendant townsite company. On May 28, 1887, the plaintiff filed in the United States land office at Helena an offer to contest the Campbell entry, alleging that it was fraudulent and invalid. Plaintiff's offer to contest was allowed, and the hearing thereupon was had, commencing in December, 1887, and extending into January, 1888. Prior to the hearing Campbell died. The defendant townsite company defended the contest proceedings.

It seems that the local land officers at Helena, Montana, dismissed the contest, and plaintiff appealed to the commissioner of the general land office. On November 25, 1890, the commissioner rendered a decision holding the Campbell entry intact, and adjudged that the contest initiated by Graham be dismissed. On December 19, 1890, plaintiff prayed for a review and reconsideration of the commissioner's decision rendered November 25th preceding, which was granted. On February 25, 1891, the commissioner rendered a decision revoking and setting aside his decision of November 25, 1890, and holding Campbell's cash entry for cancellation. On March 26, 1891, the townsite company applied to the commissioner of the general land office by petition to have the Campbell entry declared confirmed by virtue of Section 7 of the Act of Congress approved March 3, 1891, c. 561, 26 Stat. 1098, upon the ground that the townsite company was a *bona fide* purchaser of the land

within the meaning of the Act. Thereafter, and on April 24, 1891, the commissioner made and filed an order suspending his previous order of February 25, 1891, staying all proceedings thereunder. Thereafter the commissioner, having taken proof upon the question as to whether the townsite company was a *bona fide* purchaser within the meaning of the Act of March 3, 1891, found it so to be, and declared the Campbell entry confirmed by virtue of said Act. From this action on the part of the commissioner Graham appealed to the secretary of the interior, who, on May 23, 1895, dismissed the appeal, approved the order of the commissioner, and confirmed the Campbell entry to the townsite company. Patent for the land was issued and delivered to the company on August 17, 1895. On December 24, 1898, the plaintiff commenced this action for the purpose of having the defendants declared his trustees for the land in question, praying that they be decreed to execute and deliver to him a deed therefor free from all incumbrances done or suffered by them.

Plaintiff contends: (1) That he had the first legal claim to the land upon the cancellation of the entry. (2) That the Campbell entry was canceled when the Act was passed, and the commissioner's judgment holding the same for cancellation has never been modified, reversed or set aside; that it was erroneously and wrongly suspended because of the misconstruction of the operation of the Act of 1891. (3) By accepting the government's offer to contest, spending his money thereon, and procuring the cancellation of the entry, plaintiff had a vested right to purchase the land, which right was properly within the meaning of the law. (4) Contests then pending were not intended to be included within the operation of the Act of 1891.

When plaintiff began his contest he relied upon Section 2 of the Act of May 14, 1880, c. 89, Sec. 2, in which it is provided that "in all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead or timber culture entry, he shall be notified by the register of the land office of the district in which such land is

situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands." 21 Stat. 140 (U. S. Comp. St. 1901, p. 1392.)

As we have seen, on February 25, 1891, plaintiff's contest was sustained, and the Campbell entry was held for cancellation. On March 3, 1891, "An Act to repeal timber culture laws, and for other purposes," became a law. Section 7 of this Act provided in part: "And all entries made under the pre-emption, homestead, desert land or timber culture laws, in which final proof and payment may have been made and certificates issued, and to which there are no adverse claims originating prior to final entry and which have been sold or incumbered prior to the first day of March, eighteen hundred and eighty-eight, and after final entry, to *bona fide* purchasers, or incumbrancers, for a valuable consideration, shall, unless upon an investigation by a government agent, fraud on the part of the purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the land department of such sale or incumbrance." (26 Stat. 1098.)

So long as title to the public domain remains in the United States, the individual citizen has no privileges therein save such as are granted by statute. His right to obtain land under the federal statutes is a mere bounty extended to him by a generous government. Until his rights become vested in a specified tract of land, as we shall see, congress may take from him any privileges it has theretofore extended to him.

The Act of 1880, *supra*, was passed for the purpose of exposing and preventing fraud in the acquisition of the public lands, as well as to restore the lands to the public domain. As a reward for prosecuting a contest to a successful completion, congress gave to the contestant a preferential right, as against other entrymen, to enter the land which had been restored to the public domain through his efforts. While the fraudulent entry was pending, the land was temporarily withdrawn out of the public domain, and beyond the reach of other entrymen. (*Hodges v. Colcord*, 193 U. S. 192, 24 Sup. Ct. 433, 48 L. Ed.)

So that, unless congress otherwise disposed of the land embraced in the Campbell entry upon its cancellation, plaintiff had the the right to purchase it. But was the Campbell entry ever canceled? The local officers recommended that plaintiff's contest be dismissed. The commissioner of the general land office decided against plaintiff, and directed such dismissal. Upon rehearing the commissioner revoked and set aside his first decision, and held the Campbell entry for cancellation. The townsite company had sixty days in which to appeal from this decision to the secretary of the interior. (Rule 86, 4 Land Dec. 47.) Failing to appeal, the commissioner's decision would have become final. (Rule 112, 4 Land Dec. 49; *Murray v. Polglase*, 17 Mont. 455, 43 Pac. 505.) Within the time limited for appeal the townsite company applied for a confirmation of its title under the Act of March 3, 1891, alleging itself to be a *bona fide* purchaser thereof. On April 24, 1891, also within the time allowed the townsite company to appeal, the commissioner suspended his judgment of February 25, 1891, and stayed all proceedings thereunder, and, upon taking proof, found the townsite company to be a *bona fide* purchaser of the land, confirmed the entry, and dismissed plaintiff's contest. It is apparent, therefore, that plaintiff never procured the cancellation of the Campbell entry. It never *was* canceled.

If the commissioner had the right to revoke and set aside his judgment of November 25, 1890, he had a like right to suspend that of February 25, 1891. He finally dismissed plaintiff's contest, which was a final judgment in favor of the townsite company. Whether he misconstrued the law in so doing we shall see later on. But under the view we take of this case it is immaterial whether plaintiff procured the cancellation of the Campbell entry or not. Let us concede that he did procure its cancellation, and therefore had the first right to enter the tract of land thus restored to the public domain. His position then was the same as if he had been a pre-emptor who had made settlement of and improvement upon public land, but had not yet made

entry thereof. It will be remembered that a pre-emptor was one who, by settlement upon and improvement of public land, acquired a preferential right to purchase the particular tract in his occupancy, if it did not exceed 160 acres in extent, at the minimum price thereof, when the land was or became open to sale. Settlement and improvement were prerequisite to the entry; but, having made such, the claimant's right to enter the land within the time limited by statute was paramount over all except the United States. So, under the Act of May 14, 1880, a contestant who procured the cancellation of a pre-emption, homestead or timber culture entry was allowed a preferential right to enter the lands involved. This preferential right began when the contestant received notice of the cancellation from the register, and it continued for thirty days.

It is evident that the pre-emptor's right of entry is the same as the successful contestant's; they are of like degree. The pre-emptor was a settler upon the public land, and had a preferential right to enter it. A contest having been sustained, the land was restored to the public domain, and the contestant had a preferential right to enter it. But this right was in either case only a right to be preferred over any other claimant. It was the privilege of becoming the first entryman or purchaser of the land. It was not a right which could be enforced against the government. It was not a right which could be sold, incumbered or inherited. It was a mere personal privilege. It was not a vested right. In order for plaintiff to avoid the force of the Act of March 3, 1891, he must show that he has a vested right against the United States; otherwise congress had the right to dispose of the land as it saw fit. Our view of this matter is amply sustained by the authorities.

The fifth amendment to the federal constitution declares that no person shall be deprived of life, liberty or property without due process of law. This is the section under which it is claimed that certain rights become vested; that is, they become such rights as are generally included within the term "property."

In the case of *Evans-Snider-Buel Co. v. McFadden*, 105 Fed. 293, 44 C. C. A. 494, 58 L. R. A. 900, Thayer, circuit judge, speaking for the court, said: "The phrase 'a vested right' has no very precise signification. It is an expression which is not used in the federal constitution, nor in any of its amendments; the language of the fifth amendment being that 'no person shall * * * be deprived of * * * property without due process of law.' In the law of real property—where it is most frequently employed—the word 'vested' is used to define an estate, either present or future, the title to which has become established in some person or persons, and is no longer subject to any contingency. And when the phrase 'a vested right' or a 'vested interest' is used in other relations it may with reasonable precision be held to mean some right or interest in property that has become fixed or established, and is no longer open to doubt or controversy." This case was appealed to the Supreme Court of the United States, which approved of the opinion in express terms. (185 U. S. 505, 22 Sup. Ct. 758, 46 L. Ed. 1012. And see *Calder v. Bull*, 3 Dall. 386, 1 L. Ed. 648; Black's Constitutional Law, Sec. 154.)

The two leading cases on this subject are *Frisbie v. Whitney*, 9 Wall. 187, 19 L. Ed. 668, and *The Yosemite Valley Case*, 15 Wall. 77, 21 L. Ed. 82. Mr. Justice Field, speaking for the court in *The Yosemite Valley Case*, said: "The question here presented was before this court, and was carefully considered, in the case of *Frisbie v. Whitney*, reported in the 9th Wallace (19 L. Ed.). And it was there held that under the pre-emption laws mere occupation and improvement of any portion of the public lands of the United States with a view to pre-emption do not confer upon the settler any right in the land occupied, as against the United States, or impair in any respect the power of congress to dispose of the land in any way it may deem proper; and that the power of regulation and disposition conferred upon congress by the constitution only ceases when all the preliminary acts prescribed by those laws for the acquisition of the title, including the payment of the price of

the land, have been performed by the settler. When these prerequisites have been complied with, the settler for the first time acquires a vested interest in the premises occupied by him, of which he cannot be subsequently deprived." And see *Campbell v. Wade*, 132 U. S. 34, 10 Sup. Ct. 9, 33 L. Ed. 240; *Northern Pacific Railroad Co. v. Smith*, 171 U. S. 260, 18 Sup. Ct. 794, 43 L. Ed. 157; *Emblen v. Lincoln Land Co.* (C. C.), 94 Fed. 710; *Id.*, 102 Fed. 559, 42 C. C. A. 499; *Id.*, 184 U. S. 660, 22 Sup. Ct. 523, 46 L. Ed. 736; *De Land v. Day & Son*, 45 Iowa, 37; *Northern Pacific R. R. Co. v. Perento*, 3 Dak. 217, 14 N. W., 103; *Pierce v. Sparks*, 4 Dak. 1, 22 N. W. 491; *Forbes v. Driscoll*, 4 Dak. 336, 31 N. W. 633; *Hutton v. Frisbie*, 37 Cal. 475; *Low v. Hutchings*, 41 Cal. 634; *Farley v. Spring Valley M. & I. Co.*, 58 Cal. 142; *Buxton v. Traver*, 67 Cal. 171, 7 Pac. 450; *Busch v. Donohue*, 31 Mich. 481; *Manning v. San Jacinto Tin Co.*, 7 Sawy. 418, 9 Fed. 726; *Allen v. Forrest*, 8 Wash. 700, 36 Pac. 971, 24 L. R. A. 606.

In the case of *Norton v. Evans*, 82 Fed. 804, 27 C. C. A. 168, Brewer, circuit justice, said: "His contention is, however, that he had tried to enter the land, had a right to enter it; that his application was erroneously refused by the local land officers; that he had sought to settle upon the land, and had been prevented therefrom by the wrongful acts of one of the defendants; that all this took place before the passage of the Act of 1887; and that thereby he had acquired a vested right in the land, which even congress could not take away. He refers to *Ard v. Brandon*, 156 U. S. 537, 15 Sup. Ct. 406, 39 L. Ed. 524, as authority for the proposition that he could not be deprived of any rights by the wrongful acts of the local land officers, and insists that therefore the case must be treated as though he had actually made a homestead entry, and had acquired such a right in the land as was beyond the reach of congress to disturb by subsequent legislation; and concludes therefrom that the Act of 1887 (Act March 3, 1887, c. 376, 24 Stat. 556; U. S. Comp. St. 1901, p. 1595) has no application to his case. We are unable to agree with this contention. He is in no better

position than if he had been allowed by the local land office to make the entry. Such an entry creates no vested rights as against the United States, and does not interfere with the power of congress by subsequent legislation to dispose of the land. *Frisbie v. Whitney*, 9 Wall. 187, 19 L. Ed. 668; *The Yosemite Valley Case*, 15 Wall. 77, 21 L. Ed. 82; *Buxton v. Traver*, 130 U. S. 232, 9 Sup. Ct. 509, 32 L. Ed. 920; *Campbell v. Wade*, 132 U. S. 34, 10 Sup. Ct. 9, 33 L. Ed. 240." *Shiver v. United States*, 159 U. S. 491, 16 Sup. Ct. 54, 40 L. Ed. 231; *Emblen v. Lincoln Land Co.* (C. C.), 94 Fed. 710; *Id.*, 102 Fed. 559, 42 C. C. A. 499; *Id.*, 184 U. S. 660, 22 Sup. Ct. 523, 46 L. Ed. 736.

The Act of March 3, 1891, was a remedial statute—a statute of repose. It was intended to protect *bona fide* purchasers only. It extended no clemency or protection to the fraudulent entryman. At the time it was passed that portion of the Northwest with which we are dealing was in the midst of an era of settlement and development. Title to all lands was secured from the United States through its general land laws or by special Acts of congress. It often occurred that an entryman settled upon a tract of land, procured his final receipt therefor, sold to a *bona fide* purchaser and moved on. Then a contest was initiated against the entry. No patent had as yet been issued. The purchaser might find himself deprived of that which he had bought innocently, in good faith, and for a valuable consideration. Possibly he could not disprove the allegations made by the contestant. His grantor was gone, or perhaps had died, as had defendants' predecessor, Campbell. Such a condition of affairs necessarily retarded the growth and development of the country, and it is undoubted that congress passed the Act in question with a view to remedy such evils. The very terms of the Act confirm this. There can be no doubt that congress had the power to pass the Act, and that it inured to the benefit of the defendants in this case. It operated to cut off plaintiff's contest. Whether congress intended that the Act should cut off pending contests where the land was in possession of *bona fide* purchasers

can hardly be open to question in view of the language employed. The commissioner of the general land office and secretary of the interior decided that it did so operate, and, we think, correctly. As we have seen, the plaintiff had acquired no vested right as against the United States, and congress could cut off his contest if it saw fit so to do. (*The Emblen Cases, supra.*)

The land department decided that the defendant townsite company was a *bona fide* purchaser. Plaintiff does not contend in his brief, nor did he in argument, that defendants are not *bona fide* purchasers; but whether he does or not is immaterial under the law. The land department's finding upon that issue is concusive upon us. (*Small v. Rakestraw*, 28 Mont. 413, 72 Pac. 746, and cases cited.)

Counsel for plaintiff here contends, as did counsel in *Frisbie v. Whitney, supra*, that because plaintiff "did all that was in the power of any one to do toward perfecting his claim, he should not be held responsible for what could not be done," and we may answer his argument in the language used by Mr. Justice Miller in that case: "To this we reply, as we did in the case of *Rector v. Ashley*, 6 Wall. 142, 18 L. Ed. 733, that the rights of a claimant are to be measured by the Acts of congress, and not by what he may or may not be able to do; and, if a sound construction of these Acts shows that he had acquired no vested interest in the land, then, as his rights are created by the statutes, they must be governed by their provisions, whether they be hard or lenient." And the suggestion of Mr. Justice Field in the *Yosemite Valley Case, supra*, is also pertinent here: "The whole difficulty in the argument of the defendant's counsel arises from his confounding the distinction made in all the cases, whenever necessary for their decision, between the acquisition by the settler of a *legal right to the land* occupied by him as against the owner, the United States; and the acquisition by him of a *legal right as against other parties to be preferred in its purchase*, when the United States have determined to sell. It seems to us little less than absurd to say that a settler or any other person, by acquiring a right to be preferred in the pur-

chase of property, provided a sale is made by the owner, thereby acquires a right to compel the owner to sell, or such an interest in the property as to deprive the owner of the power to control its disposition." From the foregoing it is apparent that plaintiff's action cannot be maintained.

The relief demanded by plaintiff must be denied him for another reason. Under the well-known rule, before he may prevail, he must not only show that the townsite company was not entitled to the patent, but also that he is. (*Power v. Sla*, 24 Mont. 243, 61 Pac. 468; *Small v. Rakestraw*, 28 Mont. 413, 72 Pac. 746; *Gebo v. Clarke Fork Coal Mining Co.*, 30 Mont. 87, 75 Pac. 859.) It is apparent from the record that he cannot do this.

No declaration of homestead has ever been made in the land office, or fees paid for the land by plaintiff. It is now too late to do so, because title has passed from the United States. The time for these acts to be done, if there ever was such a time, is forever gone. Yet the plaintiff, without having done the acts prescribed by the government with respect to the acquisition of a patent under the homestead laws, asks to have the legal title to the land conveyed to him free from all charges and incumbrances. "The true doctrine is that, until the complainant had complied with all the statutory requisitions—had filed his declaration, and paid the sum of money required, as well as occupied, cultivated and improved the land, as provided in the statute—he had no vested rights in the premises, no rights which might not be cut off and defeated by a grant by the United States to a third party, and hence no right which, at least in the absence of fraud or gross mistake, he could assert against such third party." (*Higgins v. Board of Trustees*, 94 Ala. 380, 10 South. 312.) No such fraud or gross mistake appears in this case.

A patent is an instrument of security and repose. The title it conveys should not be disturbed unless the proof of its invalidity be clear and convincing.

Plaintiff asks a court of equity to take the land away from defendants, and give it to him. He says it was inequitable for

congress to pass an Act which took away his right to contest, after he had spent time and money in its pursuit, and after he had obtained a favorable decision from the commissioner. Conceding this to be true, is it equitable to take the land away from the defendants, *bona fide* purchasers? We are not impressed with plaintiff's good faith in this case. What are the facts as disclosed by the record? At the time of the settlement by Campbell upon the land and of his entry thereof it was remote from any village or city, and was of no apparent value for any other purposes than of cultivation. There was no village or settlement on the present site of the city of Great Falls. The county of Cascade had not been organized. The land lay in the county of Chouteau, the nearest village then being Fort Benton, which was distant about forty-five miles. At that time the line of the defendant railway company did not extend into the present limits of the state of Montana. The defendant townsite company was incorporated on May 9, 1887. During that year the line of the defendant railway company was extended into the then territory of Montana, and through the now existing counties of Valley, Chouteau and Cascade, and over and across the lands described in the complaint. In anticipation of and because of the proposed extension of the said line of railway, there had grown up the then small village of Great Falls. The Montana Central Railway Company was organized in the year 1886 for the purpose of constructing a railway to connect with that of the defendant railway company from a point on Sun river, less than a mile distant from the land described in the complaint, to the city of Helena, in Lewis and Clarke county, and other points; and prior to the initiation of the contest by plaintiff was engaged in the construction of its railway line from said point on Sun river to the city of Butte. Owing to the construction of these railway lines and the growth and development of the village, which subsequently became the city of Great Falls, the land in question, in the month of May, 1887, when plaintiff initiated his contest, had greatly increased in value. Looking backward a moment, we see that in October,

1883, Campbell obtained his final receipt, and sold the land to Collins. Collins sold to Gibson and Vaughn. More than three years elapsed. Nothing was done by plaintiff; nothing until the land had become valuable for railway and townsite purposes, and when it was apparent that a city was to spring up within a stone's throw. Then, after the final receipt had been treated as equivalent to a patent by the world for over three and a half years, and after Hill had sold the land to the townsite company, plaintiff began his contest. Further discussion is unnecessary.

We are of opinion that the judgment should be affirmed.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment is affirmed.

MR. JUSTICE MILBURN: I concur in the above order of this court. I concur in the opinion in so far as it holds that the entry of Campbell was never canceled, and that Graham did not succeed in his contest. The rest of the opinion I think is unnecessary.

Rehearing denied June 7, 1904.

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SHROPSHIRE, RESPONDENT, v. SIDEBOTTOM,
APPELLANT.

(No. 1,889.)

(Submitted April 27, 1904. Decided May 23, 1904.)

Bailment—Duty of Bailee for Hire—Burden of Proof—Appeal—Record—Instructions.

1. In the absence of a special contract with reference to the bailment, ordinary care only is required of a bailee for hire.

2. In an action against a bailee for hire for failure to redeliver the article as agreed, it having been lost, he has the burden of showing he used ordinary care.
3. *Obiter*: Where the bailor alleges negligence on the part of the bailee as the basis of the bailor's right to recover, the burden is on the bailor to prove such allegation.
4. A pasture, in which a bailee for hire of horses put them, and from which they escaped, is in law not inclosed at all, it not being wholly inclosed by a good and sufficient fence.
5. Instructions not being made part of the judgment roll are not open to review.

Appeal from District Court, Silver Bow County; J. B. McClearn, Judge.

ACTION by J. S. Shropshire against R. B. Sidebottom. Judgment for plaintiff. From an order overruling his motion for a new trial, defendant appeals. Affirmed.

Mr. M. E. Le Blanc, and Mr. J. Bruce Kremer, for Appellant.

Mr. Dan Yancey, for Respondent.

MR. COMMISSIONER POORMAN prepared the following opinion for the court:

This is an appeal from an order overruling defendant's motion for a new trial.

The plaintiff left with the defendant two horses, one of which the defendant agreed for a consideration to break to drive. The other horse was simply to be kept by defendant that the two might be driven together. The defendant at that time was engaged in the business of breaking and training horses. Under the terms of their agreement the horses were to be redelivered to the plaintiff on a certain day and at a certain place. The defendant did not make delivery of the horses, and some time afterwards the plaintiff brought this action in conversion to recover from the defendant their value in damages. The defense interposed was that the defendant had turned the horses into a pasture with other stock, and that they had by some means unknown to him escaped therefrom, and, though he had

made diligent search, had been unable to find them. The case was tried to a jury, and a verdict rendered in favor of plaintiff.

It is claimed by defendant that the evidence is insufficient to support the verdict, for the reason that it appears from the evidence that the defendant was not guilty of any negligence in the care of the horses, and that the value of the horses as found by the jury is not sufficiently established; that the witnesses who testified relative to the value were not properly qualified. The evidence respecting the value is in conflict, and the witnesses had been, we think, sufficiently qualified to testify as to value.

Counsel for defendant is correct in his assumption that the defendant in this case was not an insurer. He was a bailee for hire. Section 2491 of the Civil Code reads: "A depositary for hire must use at least ordinary care for the preservation of the thing deposited." There is not necessarily any conflict between this section and Section 2450 of the same Code. The well-known rule that a bailee for hire is charged only with ordinary care has not been changed.

The general rule relative to bailments for hire is thus stated in *Cumins v. Wood*, 44 Ill. 416, 92 Am. Dec. 189: "Where goods are placed in the hands of a bailee in good condition, and are returned in a damaged state, or not at all, in an action by the bailor against the bailee the law will presume negligence on the part of the latter, and impose on him the burden of showing that he exercised such care as was required by the nature of the bailment." (*Funkhouser v. Wagner*, 62 Ill. 59; *Beardslee v. Richardson*, 11 Wend. 25, 25 Am. Dec. 596; *Mills v. Gilbreth*, 47 Me. 320, 74 Am. Dec. 487; *Safe Deposit Co. v. Pollock*, 85 Pa. St. 391, 27 Am. Rep. 660; *Morris v. Third Avenue R. R. Co.*, 1 Daly (N. Y.), 202; 5 Cyc. Law, p. 217; *Arent v. Squire*, 1 Daly, 347.)

In the absence of a special contract with reference to the bailment, a bailee for hire is not liable so long as he uses ordinary care; but the burden is on him to show to the satisfaction of the court or jury that he has done this. The decisions in

Wood v. Remick, 143 Mass. 453, 9 N. E. 831, *Calland v. Nichols*, 30 Neb. 532, 46 N. W. 631, and *McCarthy v. Wolfe*, 40 Mo. 520, are not in conflict with this rule. In those cases the bailor alleged negligence on the part of the bailee as the basis of the bailor's right to recover, and the decisions are to the effect that the party must prove the allegations of his complaint on which he relies for recovery.

There is nothing in this pleading nor in the evidence by which the defendant attempts to excuse himself from making delivery by reason of the "act of God" or of "the public enemy." The question of negligence is a question of fact to be passed upon by the jury. The evidence in this case relative to the character of the defendant's fence is sufficient to sustain a finding by the jury that the pasture of the defendant in which these horses were turned was not wholly inclosed by "a good and sufficient fence;" and a pasture which is not wholly inclosed is not inclosed at all within the meaning of the law. (*Smith v. Williams*, 2 Mont. 195, approved in *Monroe v. Cannon*, 24 Mont. 316, 61 Pac. 863, 81 Am. St. Rep. 439.)

The instructions are not made a part of the judgment roll, and are not before us for consideration. (*Featherman v. Granite County*, 28 Mont. 462, 72 Pac. 972; *Butte Min. & Mill. Co. v. Kenyon*, 30 Mont. 314, 76 Pac. 696; *Glavin v. Lane*, 29 Mont. 228, 74 Pac. 406.)

We therefore recommend that the order appealed from be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the order is affirmed.

MR. CHIEF JUSTICE BRANTLY, not having heard the argument, takes no part in this decision.

WAY, RESPONDENT, v. SHERMAN ET AL., APPELLANTS.

(No. 1,868.)

(Submitted April 21, 1904. Decided May 23, 1904.)

Trial by Referee—Erroneous Admission of Evidence—Appeal—Conflicting Evidence.

1. Admission of immaterial evidence in an action tried by a referee is not ground for reversal, there being sufficient competent evidence to sustain the judgment.
2. The judgment, so far as it depends on findings of fact, will not be disturbed on conflicting evidence.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

ACTION by Charles M. Way, doing business as the Minneapolis Bedding Company, against E. H. Sherman and another, doing business as the Sherman Mattress Company, and another. Judgment for plaintiff. From the judgment, and an order denying their motion for a new trial, defendants appeal. Affirmed.

Mr. J. K. Macdonald, Mr. T. Bailey Lee, and Mr. T. J. Walsh, for Appellants.

There cannot be a delivery of goods to a carrier without reasonable notice, and, "if goods are placed on his cart, boat or car without his knowledge or acceptance, or that of his agent, he is not liable." (*Illinois Central Ry. Co. v. Smyzer*, 38 Ill. 354, 87 Am. Dec. 303, citing Angell on Carriers, Sec. 140; *Packard v. Getman*, 6 Cow. 757, 16 Am. Dec. 475; Lawson's Rights, Remedies and Practice, Vol. 4, Sec. 1805, p. 3099; Hutchinson on Carriers, 82, 96; *Grosvenor v. N. Y. C.*, 36 N. Y. 34; *Robertson v. Walter*, 51 Ala. 484.)

The evidence showed that the shoddy, if delivered at all, was shipped as rags, and the referee so found; also that the defend-

ants were ignorant of the manner in which it was shipped. The evidence also showed that shoddy took a different classification from rags and a higher freight rate. Also, that shoddy was more combustible than when in the rag form. The rule is, "If any fraud or unfair concealment is used, the carrier will not be responsible for any loss and it will make the contract between them null and void." (*Hayes v. Wells, Fargo & Co.*, 23 Cal. 185; *Relf v. Rapp*, 3 Watts & Ser. 21, 37 Am. Dec. 528; *Coxe v. Heiseley*, 79 Pa. St. 243; *Savannah, Florida Western Railway Co. v. Collins*, 71 Ga. 376, 4 Am. St. Rep. 87; *Hutchinson on Carriers*, 211; *Pac. Ex. Co. v. Pitman*, 71 S. W. 312; *Chicago v. Shea*, 66 Ill. 471; *Shackl v. S. C. Co.*, 28 L. R. A. 176; *Charleston v. Moore*, 5 S. E. 769.)

It is a rule governing the delivery of goods to a common carrier so that it shall be considered a delivery to the consignee, that the shipper shall exercise such care in shipping that, in case of loss, the consignee shall have recourse against the common carrier. (*Parsons on Contracts*, 8th Ed., Vol. 1, bot. p. 556, and note; *Benj. Sales*, 6th Ed., p. 669; *Clarke v. Hutchins*, 14 East. 475; *Buckman v. Levi*, 3 Camp. 414; *Cothay v. Tute*, 3 Camp. 129; *Kent's Com.*, 12th Ed., Vol. 2, bot. p. 693.)

The referee apparently recognized the correctness of the contention that, if a fraud were practiced upon the common carrier by the shipper, it would not constitute a delivery to the buyer; but he held that it was "necessary for the defendants to show that the railroad company, as such common carrier, was ignorant of the fact that the shoddy described in the complaint was shipped as rags," citing *Jones on Evidence*, Secs. 178 to 180. The referee might as well have said that, as the common carrier could not have been held if there was negligence in the loading of the shoddy in the car, it devolved upon the plaintiff to prove, before he could recover, that there was no such negligence. It was no more necessary to prove one of these negatives than the other. It was proven that rags took one classification (D, 75c.), shoddy another (3d class, \$1.75). The law

presumes that things are done regularly, and it is he who seeks to establish the contrary who has the burden of proof. It was shown by the plaintiff's testimony that the shoddy was shipped as rags, and the referee so found. This, upon its face, shows a deception, provided the ordinary course of business was followed. That there is always a presumption "that the ordinary course of business has been followed," see the following: Rice on Evidence, Vol. 1, p. 57; Ency. of Law, 1st Ed., Vol. 19, p. 52.

If the plaintiff's transaction with the railroad, though unusual and irregular, was an honest one, it was easy for him to explain it, but that he failed to do. He was asserting a delivery to a common carrier. The defendant denied that assertion. The plaintiff's proof, therefore, without some explanation of his irregular shipment, utterly failed to prove his allegation of delivery to the carrier. Whether plaintiff notified the railroad company that it was shoddy he was shipping as "rags," was something peculiarly within his knowledge, and he should have shown that affirmatively, rather than that the defendant should be required to take up and prove the negative. (Gr. Ev., 15th Ed., Sec. 79; Jones, Ev., Sec. 179.)

Mr. J. M. Hinkle, for Respondent.

MR. COMMISSIONER CALLAWAY prepared the following opinion for the court:

This action was brought to recover the sum of \$218.86 for one carload of shoddy alleged to have been sold and delivered by plaintiff to defendants. It was alleged that the shoddy was delivered to the defendants on board the cars of the Great Northern Railway Company at Minneapolis. Defendants denied the sale and delivery. The defendants did not receive the shoddy from the railway company. It seems that it was destroyed while in the company's charge. By agreement of counsel the lower court referred the cause to J. L. Wines, Esq., to take testimony, with directions to report the same with his con-

clusions of fact and law. The referee did as directed, and reported, as his findings and conclusion, that the plaintiff should have judgment as prayed for. Thereupon the court adopted the referee's report and entered judgment in accordance therewith. The defendants moved for a new trial, which was denied. From the judgment, and order denying their motion for a new trial, they have appealed.

The only question raised by defendants is that of delivery. The case was tried upon the theory that, if the shoddy was delivered to the Great Northern Railway Company at Minneapolis, the defendants are liable; otherwise not. It appears that at the time of the alleged delivery the tariff on shoddy was \$1.75 a hundred in carload lots, while that on rags was but \$.75 a hundred. Plaintiff shipped the shoddy as rags, at defendants' instance, as he claimed. The shoddy was encased in burlap, and was thus concealed, so that one could not tell from the appearance of the packages whether they contained shoddy or rags.

It is contended by defendants that there never was a delivery to the railway company, because it is not shown that any authorized agent of the company received the shoddy, and because the plaintiff worked a fraud on the railway company when he shipped shoddy as rags. Much interesting discussion has been indulged in by counsel, but under the view we take of this case its consideration is unnecessary.

Granting that some immaterial evidence was admitted, there is sufficient competent evidence in the record to sustain the judgment. (*Lane v. Bailey*, 29 Mont. 548, 75 Pac. 191.) There was evidence strongly tending to show that the shoddy was delivered to the railway company, and that it knew plaintiff was shipping shoddy as rags. The evidence was conflicting, and upon it both the referee and court found for the plaintiff. Under such circumstances the judgment will not be disturbed. (*Nelson v. Great Northern Ry. Co.*, 28 Mont. 297, 72 Pac. 642; *Hefferlin v. Karlman*, 29 Mont. 139, 74 Pac. 201.)

We are therefore of the opinion that the judgment must be affirmed.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment is affirmed.

MR. CHIEF JUSTICE BRANTLY, deeming himself disqualified, takes no part in this decision.

MALONEY ET AL., RESPONDENTS, v. KING ET AL.,
APPELLANTS.

(No. 1,813.)

(Submitted April 22, 1904. Decided May 23, 1904.)

*Injunction — Operation of Ore Vein—Counter Injunction—
Multiplicity of Actions—Equity—Jurisdiction.*

1. Where, in a suit to quiet title to a vein of ore and for damages for a trespass on the vein, defendants did not seek an injunction restraining plaintiffs from operating the vein, they were not entitled to such an injunction in a subsequent suit by them, proceeding for such relief having been open to them in the former suit.
2. Where, in a suit for an injunction restraining the operation of an ore vein, the injunction was denied, complainants might not, after dismissing the suit, institute another on the same ground, and again apply for an injunction for the same purpose.
3. Plaintiffs sued for damages because of the trespass on an ore vein, for an injunction restraining defendants from operating the vein, and for the quieting of plaintiffs' title to the vein, the issue being whether the apex of the vein was within the boundaries of plaintiffs' or within the boundaries of defendants' location. An injunction was granted, and subsequently defendants commenced various suits against plaintiffs, for trespass, etc., on the vein, the question in all the actions being the location of the apex of the vein. *Held*, that plaintiffs were properly awarded in their original suit an injunction restraining defendants from bringing any action or interfering with the removal of ores from the vein until the final determination of plaintiffs' suit.
4. When a court of equity takes jurisdiction of a controversy between parties, its jurisdiction is full and complete, and it may render a final judgment in relation to all matters involved in and growing out of that controversy.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

SUIT by J. H. Maloney and others against Silas F. King and others. From an order extending an injunction *pendente lite*, defendants appeal. Affirmed.

Mr. James E. Murray, and Messrs. McBride & McBride, for Appellants.

Mr. John J. McHatton, and Mr. C. P. Drennen, for Respondents.

MR. COMMISSIONER CLAYBERG prepared the following opinion for the court:

Appeal by defendants from an order extending the terms of an injunction *pendente lite*. The circumstances out of which the order complained of arose are, briefly, as follows: Plaintiffs were the owners of a certain portion of the Plymouth quartz lode mining claim. Defendants were the owners of the Silver King quartz lode mining claim, which adjoins the Plymouth claim on the north. Both are patented properties. The veins having their apices within the boundaries of the Silver King apparently dip to the south, and under the surface boundaries of the Plymouth. In the year 1899 plaintiffs began this suit against defendants to recover damages for an alleged trespass upon the Plymouth by means of underground workings conducted through a shaft upon the Silver King, and the extraction of ores from a vein whose apex is alleged to be within the Plymouth surface boundaries, and for an injunction against further trespasses. Plaintiffs also sought to have their title to the vein in question determined and quieted. The defendants in their answer denied the alleged trespass, and set up that this vein had its apex within the surface boundaries of the Silver King, owned by them, and dipped under the surface boundaries of the Plymouth. They also asked the court that their title to the vein in question be determined and quieted. An injunction *pendente lite* was issued against defendants soon after filing the bill of complaint, which restrained defendants "from entering

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and trespassing upon, or working, or mining, or excavating, or digging within or underneath the surface of that portion of the Plymouth mining claim hereinafter described, and from extracting, taking away, or converting to their own use any of the ores, rocks or minerals therein, and from in any way interfering with any portion of the said premises, or any part thereof, or any rock or ores or mineral therein, within the surface lines of said portion of said Plymouth lode claim, hereinafter described, extended vertically downward." The action of the court below in granting the above injunction was affirmed by this court on appeal. The defendants, soon after the granting of this injunction, instituted a suit against plaintiffs herein, alleging a trespass by them upon the same vein, claiming that the apex thereof was within the surface boundaries of the Silver King, and not within the surface boundaries of the Plymouth, and asked that an injunction issue against plaintiffs herein to restrain them from further trespass. This injunction was denied, and the plaintiffs therein (defendants herein) appealed to this court, and made an application for an injunction pending the appeal, which was refused. They then dismissed the appeal, and filed a *praecipe* in the court below dismissing the case. On the same day they instituted a new suit, setting forth, in substance, all the matters alleged in the suit last mentioned, and the further allegation that the plaintiffs herein were filling up the work theretofore done by the plaintiffs in that suit and destroying their evidence. Another temporary injunction was applied for. The defendants in that suit answered, setting up, among other things, the pendency of this suit, and also the commencement and dismissal of the other suit. Plaintiffs in that suit applied for a temporary injunction, which was refused. This action was dismissed on grounds which are unimportant here.

The practice pursued by defendants in this regard cannot be countenanced or approved of by this court, for at least two reasons:

1. The object of defendants sought to be accomplished by

these two suits was undoubtedly to obtain a reciprocal or mutual injunction. They, being enjoined from working the disputed ground, desired that the plaintiffs should also be enjoined, so that the premises should remain in *statu quo* pending the litigation. However desirable such result would seem to be, it could have been attained in the original suit by petition on part of defendants setting forth the facts and the reasons for such relief. Upon a hearing, if the court concluded that a proper showing had been made, it would undoubtedly have granted the relief sought. The policy of the law is to prevent useless litigation, and, whenever a proceeding is instituted broad enough in its character to include the hearing and determination of all existing issues between the parties touching the same subject-matter, such issues should all be presented for determination in that suit, and neither the court nor the parties be vexed with separate suits.

2. We cannot commend the practice of filing a complaint and applying to a court for an injunction, and, if denied, dismissing the suit and instituting another of the same character for the same relief, and again applying to the same judge, or another judge, for an injunction. The writ of injunction is one of the extraordinary processes of the courts, and should not be trifled with. If an injunction be denied, the applicants have a remedy by appeal, and there is no reason why the decision on appeal should not be conclusive and binding upon applicants, the same as in every other suit. (*Wetzstein v. Boston & Montana Consol. C. & S. Mining Co.*, 26 Mont. 193-208, 66 Pac. 943.) These points do not necessarily arise in this case, but the practice pursued herein seems to be more or less general throughout the state, and this court deems it proper to announce what it considers the correct practice.

Subsequent to the above proceedings, various suits were commenced by defendants herein as plaintiffs, against plaintiffs herein as defendants (in some of which suits third persons were joined as defendants), some of which were for the recovery of certain ores extracted by the plaintiffs herein, and others for

the value of certain ores as upon a conversion, all taken from the same vein in controversy. Some nine of these suits were pending at the time application was made for the order appealed from. The affidavits upon which this order was granted stated that all of the ores involved in these nine suits were taken by the defendants therein (plaintiffs herein) from a vein which had its apex within the Plymouth surface boundaries. The defendants presented affidavits by which they claimed that, while the ore was taken from the same vein, the apex thereof was within the surface boundaries of the Silver King. Plaintiffs thereupon asked that the preliminary injunction against defendants, above mentioned, be amended, enlarged and extended so as to restrain defendants from "bringing any action, suits or proceedings against the plaintiffs herein, or their lessees or any person acting under them, and from interfering with the mining or the removal of ores from the Plymouth lode claim until the final determination of this action, and that the temporary injunction order heretofore issued be amended, extended and enlarged so as to specifically enjoin them therefrom." Upon the hearing of this application plaintiffs introduced the complaints and answers in the suits brought by the defendants for an injunction, and the complaints and summons in each of the nine suits above mentioned for the recovery of ore or the value thereof. At the conclusion of the hearing the court extended the injunction as asked. The defendants settled a bill of exception and appeal from such order.

It is very doubtful whether the brief presented by appellants complies with the rules of this court, and consideration of the appeal is objected to on this ground. But an investigation of the briefs and record has disclosed the fact that one prominent question is presented to the court for consideration, and, it being a question of more or less importance to litigants in general, we have concluded to give such question consideration, under the theory announced in *Alder Gulch Con. Min. Co. v. Hayes*, 6 Mont. 31, 9 Pac. 581, and *Brownell v. McCormick*, 7 Mont. 12, 14 Pac. 651.

As before stated, the appeal is from the order of the court extending the terms of the preliminary injunction as petitioned for. No question is raised as to the appealable character of this order, and therefore this question is not considered or decided. The only question which can be considered upon the brief of appellants is whether the court erred in making the order appealed from. The consideration of this question involves only the correctness of this ruling in so far as it affects the plaintiffs herein. The effect of our conclusions upon third parties to suits whose prosecution has been restrained is not considered or decided. Bearing in mind that the question as to whether the apex of the vein was within the surface boundaries of one location or the other, and that the ownership and title thereto, and consequently the primary ownership of all ore in such vein, would be determined in this suit, it follows that the important question of such ownership of the ore involved in each of the nine suits which were enjoined could have been heard and determined in this suit.

If the ores in question in these suits were extracted from a vein the apex of which was within the surface boundaries of the Silver King, the plaintiffs in such suit were the primary owners thereof; but if, on the other hand, the ore in question had been extracted from a vein the apex of which was within the Plymouth boundaries, then the defendants in such suits were the primary owners thereof. So we perceive that the question at the basis of each of these suits was, within the surface boundaries of which claim was the apex of the vein from which the ore was extracted to be found? or, in other words, did the vein from which the ore was taken belong to the one party or the other? The decision in this suit would have settled the controversy as to the primary ownership of these veins, and therefore of all the ore contained therein. We are therefore of the opinion that there was no occasion for the institution of these suits, and that their pendency interfered with the jurisdiction of the court having the control of the suit in which the order appealed from was entered.

It is a well-established principle that, when a court of equity takes jurisdiction of a controversy between parties, its jurisdiction is full and complete, and it may render a final judgment in relation to all matters involved in and growing out of that controversy. Here a suit was commenced in which the primary ownership of all the ores in each vein could have been settled, and it was not only the right, but the duty, of the court to prevent a multiplicity of suits, with the attendant annoyance to plaintiffs herein, and enjoin the defendants herein from prosecuting against plaintiffs herein any suits of the character of those enjoined, until a final determination of this action. But the original injunction was sufficient to accomplish this purpose. The defendants might have been punished for a violation of its terms because of the commencement of these suits.

The following statement by Beach, in his Law on Injunctions, is very pertinent and correct: "An injunction must be obeyed in its spirit as well as its letter. The party enjoined must not do the forbidden thing, nor permit it to be done, nor effect it by trick or evasion. In deciding whether there has been a breach or not, the objects for which the relief was granted must be considered." (Beach on Injunctions, par. 251; *Grand Junction Canal Co. v. Dimes*, 17 Simons, 38, 42 Eng. Chan. Rep. 38; *Smith v. New York Cons. Stage Co.*, 28 How. Prac. 277; *Ex parte Vance*, 88 Cal. 281, 26 Pac. 118.)

To hold that the defendants could not mine any ore in the disputed territory, could not take away or convert to their own use any of the ores, rocks or minerals therein, could not interfere with any portion of the premises, or any part thereof, or any of the rocks, ores or minerals therein, but that they might recover the same, or the value thereof, after plaintiffs had extracted them, while a suit was pending the purpose of which was to determine the rights of the parties to the veins from which the ore was extracted, would be, at least, anomalous. The legal effect of the original injunction being the same before as after amendment, and this court having affirmed the granting

thereof, no error could be predicated upon the order appealed from.

We therefore advise that the order appealed from be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the order is affirmed.

FORDHAM, APPELLANT, v. NORTHERN PACIFIC
RAILWAY CO., RESPONDENT.

(No. 1,883.)

(Submitted April 25, 1904. Decided May 23, 1904.)

Appeal—Record on Appeal—Bills of Exceptions—Service—Waiver—Appeal from Judgment—Notice of Intention to Move for a New Trial—Natural Watercourse—Flood Waters of a River—Surface Water—Obstruction.

1. Objection that the bill of exceptions was not served in the manner provided by Code of Civil Procedure, Section 1831, is waived by the presenting of amendments to the proposed bill.
2. The fact that the notice of intention to move for a new trial is not in the record is no ground for dismissal of the appeal from the judgment.
3. Flood waters of a river, which become severed from the main current, or leave it never to return, and spread out over lower ground, become surface water; but if they form a continuous body with the water flowing in the ordinary channel, or if they depart therefrom presently to return, they are to be regarded as still a part of the stream, subject to the law as to obstruction thereof.
4. Under the common law overflow waters of a stream which still form part of the stream may not be obstructed by a railroad company by a fill along its right of way without openings, so as to injure the property of another.

Appeal from District Court, Missoula County; Henry C. Smith, Judge.

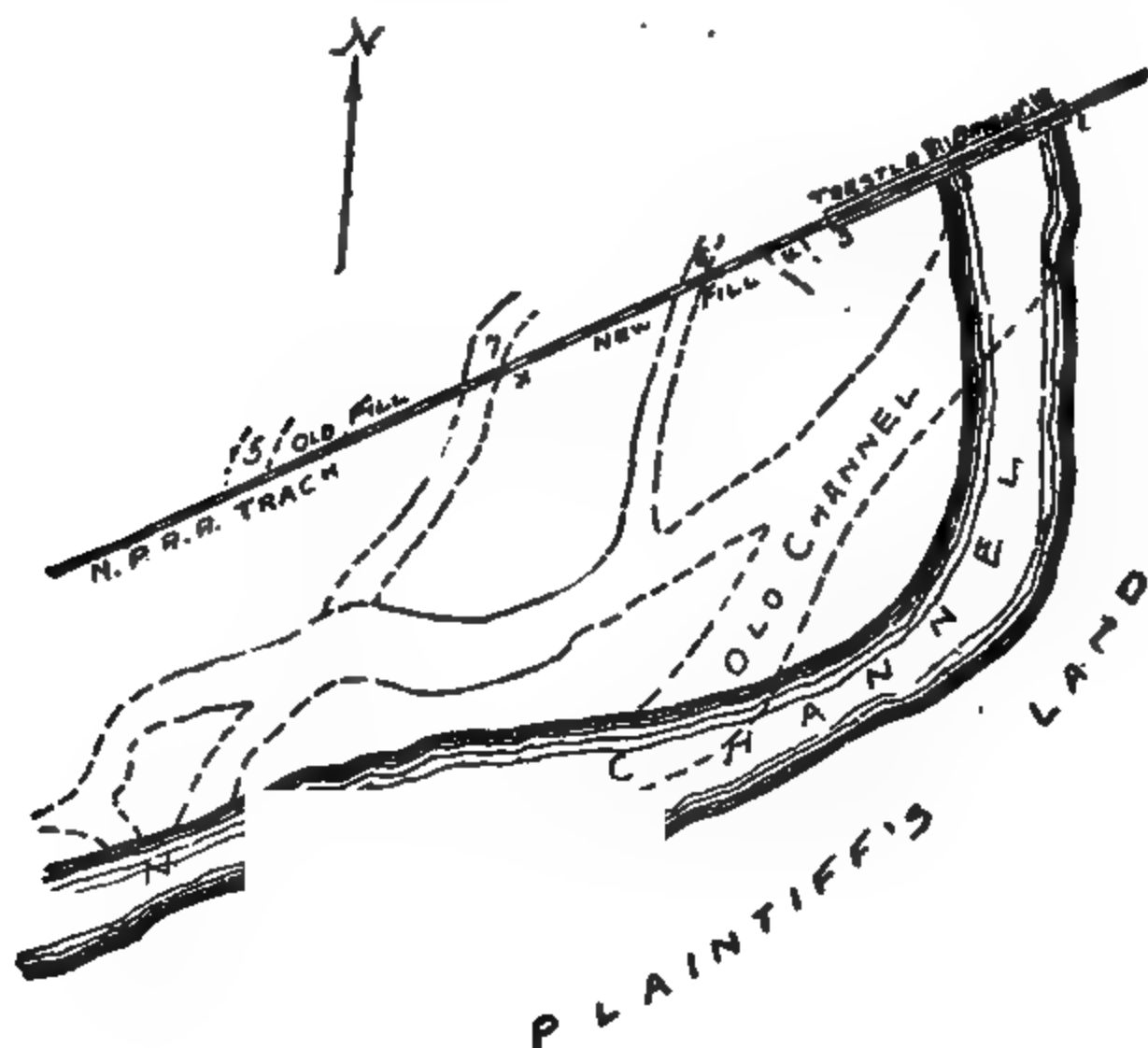
ACTION by Julia Fordham against the Northern Pacific Railway Company. Judgment for defendant. Plaintiff appeals. Reversed.

STATEMENT OF THE CASE.

This action was brought by the plaintiff (appellant here) to recover damages alleged to have been caused by the wrongful act of the defendant railway company. The plaintiff owns certain lands situated along the south bank of the Bitter Root

river. A portion of these lands are lowlands, and comprise the bottom land of the river at that point. The defendant railway company owns a right of way across the low or bottom land of the river on the north side directly opposite plaintiff's lands. Its railroad track is constructed on this right of way, and substantially parallel with the river for some distance. Near the northernmost line of plaintiff's land the river turns to the north, and is crossed by defendant's railroad by means of a bridge. Prior to 1897 there was open trestlework supporting the track for 1,400 feet west from the west pier of the bridge. From the west end of this trestle was a solid embankment or fill, constructed in 1887, but concerning which no complaint is made.

In 1897 the railway company constructed a solid embankment or fill from the east end of the old fill to a point 285 feet west of the west pier of the bridge. The subjoined diagram illustrates the relative situations of these objects.



During every spring or early summer, when the snow in the mountains at the headwaters of the Bitter Root river and its tributaries is melting rapidly, the Bitter Root overflows its banks, and spreads over the plaintiff's lands, and over the lowlands across which defendant's right of way extends. The general fall of the country is towards the north, so that prior to 1897 these flood or overflow waters ran off through defendant's trestlework to the north, and some distance below fell into the channel of the river again. Plaintiff contends that by reason of the fill or embankment made in 1897 the flood waters of the river were held back, raised and caused to overflow her land on the opposite side of the river during the annual overflows in 1898 and 1899 to a much greater extent than theretofore, and when the waters receded during these years a new channel of the river was cut wholly on plaintiff's land, wasting and destroying from ten to twenty acres of valuable agricultural land, and causing damage to her in the amount claimed at least.

Upon the conclusion of plaintiff's testimony, which tended to prove the facts herein set forth, the trial court sustained a motion for a nonsuit, and entered judgment for defendant for costs, from which judgment plaintiff appealed.

Mr. A. L. Duncan, and Messrs. Nolan & Loeb, for Appellant.

Assuming that the waters in question are flood waters and subject to the law governing surface waters, we respectfully submit that the doctrine announced in the case of *Fitzpatrick v. Montgomery*, 20 Mont. 181, is decisive of the question as to the rule that should be recognized in this state.

It is true that a common-law doctrine prevailed regarding surface water to a limited extent, but there was no authority under this common-law rule for the accumulation of surface waters upon one's land to be thrown upon another's to his injury. An inspection of the authorities discussing this particular feature clearly shows this. (*Barkley v. Wilcox*, 86 N. Y. 146; *Gannon v. Hargaden*, 10 Allen, 109; *Bellows v. Sackett*,

15 Barb. 96; *McDaniels v. Cummings*, 83 Cal. 515; *Bowlsoy v. Speer*, 31 N. J. Law, 351; *Boyd v. Conklin*, 54 Mich. 583; *Shane v. Kansas City, etc.*, 71 Mo. 245; *Kaufman v. Greismier*, 26 Pa. St. 415; *Morrissey v. C. B. & Q. Ry. Co.*, 56 N. W. Rep. 953.)

We insist that the waters of the Bitter Root in flowing as they do over the lowland back into the river again and back again to the parent stream do not cease to be the waters of the river, and that whatever the rule may be respecting surface waters, in this case the doctrine finds application that interfering with the waters of a running stream to the injury of another, exposes to liability. The following authorities sustain the position here contended for: *O'Connell v. East Tenn. Ry. Co.*, 87 Ga. 246; *Curtis v. Eastern R. R. Co.*, 98 Mass. 428; *Crawford v. Rambo*, 44 Ohio St. 282; *Barden v. City of Portage*, 79 Wis. 133; *Speelman v. City of Portage*, 41 Wis. 144; *Byrne v. Minn. & St. Louis Ry. Co.*, 38 Minn. 233; *Carriger v. R. R. Co.*, 7 Lea, 389; *West v. Taylor*, 16 Ore. 170; *Mitchell v. Bain et al.*, 142 Ind. 614; *Moore v. C. B. & Q. Ry. Co.*, 39 N. W. Rep. 390; *Sullins v. Chicago, etc. R. R. Co.*, 39 N. W. Rep. 545; *Palmer v. Waddell*, 22 Kan. 352.

In the case of *Carland v. Aurin*, 53 S. W. Rep. 940, there is a collection of the authorities, and a full discussion of the two rules, giving the states that recognize the one rule as contradistinguished from the other. (Gould on Waters, Sec. 265; 21 L. R. A. 593; see, likewise, extended note, 85 Am. St. Rep. 716 *et seq.*) In the note last referred to there is a grouping of the states recognizing the two rules, as well as citation of cases.

If the flood of 1899 was unprecedented, to escape liability, the act of the defendant should in no manner contribute to the injury complained of. If the embankment were absent the surplus water could readily have escaped towards the north and away from the premises of plaintiff. (Lawson's Rights, Remedies and Practice, Sec. 1810; *Doster v. Brown*, 71 Am. Dec. 153.) We also refer the court to the following provisions

of the statutes of this state: Civil Code, Secs. 4600, 4605 and 1250.

Mr. William Wallace, Jr., for Respondent.

The common and not the civil law doctrine prevails in Montana. (*Morrissey v. Ry.*, 56 N. W. 953; *Walker v. Ry.*, 165 U. S. 593, 41 Co-op. Ed. 837.) In four states, viz., Washington, Missouri, Kansas and South Carolina, having statutes identical with Section 5152, the statute is held to control and to demand that the common-law doctrine be observed. (*Cass v. Dix* (Wash.), 44 Pac. 113-14; *Edwards v. Ry.* (S. C.), 18 S. E., quoted, 56 N. W. 953, l. ft.; *K. C. Ry. v. Riley*, 33 Kan. 374-5-6, 6 Pac. 581, quoted in 165 U. S. 603, 41 Co-op. Ed. 843; *Abbott v. Ry.*, 83 Mo. 271, thus quoted in 38 N. W. 547, top.) And California likewise so construes the section from which we took Section 5152, *supra*, though it confesses to having mistakenly taken as the common-law doctrine the rule of the civil law. (*McDaniel v. Cummings*, 83 Cal. 515, 23 Pac. 796.)

The common-law doctrine may be stated thus: The high water overflow of rivers, when passed beyond the defined stream channel banks, and spread out on the valley bottom, is surface water, to be fought as a common enemy, and not a watercourse that must be suffered to flow over the land. This is announced in the following states and territories: Washington, Nebraska, New York, Kansas, California, Louisiana, Indiana, Missouri, New Mexico, Connecticut, New Jersey, New Hampshire and Vermont. (*Cass v. Dix*, *supra*; *Mailhout v. Pugh*, 30 La. Ann. 1359, and cases; *Ry. v. Keyes* (Kan.), 40 Pac. 275; *Morrissey v. Ry.*, 56 N. W. 946; *Meyer v. Ry.*, 88 N. Y. 355; *Taylor v. Fickus*, 64 Ind. 167; *Ry. v. Stevens*, 73 Ind. 280; *Abbott v. Ry.*, 83 Mo. 271; *McCormick v. Ry.*, 57 Mo. 438; *Hodge v. Ry.*, 39 Fed. 449-455, r. ft.; *Walker v. Ry.*, 165 U. S. 593, listing states; *Gray v. McWilliams*, 98 Cal. 157, 32 Pac. 976-8; *McDaniels v. Cummings*, *supra*; *Lamb v. Recl. Dist.*, 73 Cal. 125, 14 Pac. 625.)

None of the depressions—called channels by counsel—constitute watercourses, so as to prevent the application of the common-law doctrine of surface waters. (*K. C. Ry. v. Riley*, 6 Pac. 583.)

Whenever any court, considering this question, distinguishes surface water from a watercourse, they invariably adopt the definition of "watercourse" that has been accepted by this court in many water appropriation cases. And thus tested there can be no pretense of a watercourse outside of the highest banks of the stream channel. (*Morrisey v. Ry.*, 56 N. W. 949-50-2; *Cass v. Dix*, 44 Pac. 113; *Ry. v. Keyes*, 40 Pac. 275-8; *Rowe v. Ry.*, 43 N. W. 77, 1. ft; *Johnson v. Ry.*, 50 N. W. 772; *Lessard v. Stram*, 22 N. W. 285; *Hoyt v. Hudson*, 27 Wis. 660-1.)

An owner improving his land for the purpose of its ordinary use may divert flood water, though without such ownership and improvements he might not do so. (*Morrisey v. Ry.*, 56 N. W. 949, ft. 952 r. m.; *Hodges v. Ry.*, 39 Fed. 450; *Clauson v. Ry.*, 82 N. W. 147-8; Whittaker's Smith on Negl. 95, note cases.)

It is notable that this complaint nowhere alleges interference with any higher overflow channel, nor any defined current overflow. (*O'Connor v. Ry.*, 9 N. W. 287; *Rowe v. Ry.*, 43 N. W. 77; 82 N. W. 148, *supra*.)

There is neither allegation nor proof of negligent construction, and counsel disclaim any such contention in their brief. (56 N. W. 946, *supra*; 40 Pac. 278, *supra*.)

Independent of all else, the familiar doctrine of proximate cause demanded a nonsuit. (16 Ency. Law, 1st Ed., 428-9-30-1-2-3, 446; Whitt. Smith on Negl., 35-6-7, notes, cases; 19 Ency. Law, 1st Ed., 301; Redf. & Sherm. on Negl., 25-6-8, 32.)

This flood of 1898 or 1899 was extraordinary high water and for its ravages defendant, however at fault, could not be held responsible. (*Viterbo v. Friendlandt*, 120 U. S. 732; 57 Am. Dec. 680-682; 13 S. E. 489-493; 56 Pa. St. 445.) The evidence left it absolutely uncertain how much of the damage was done in one year and how much in the other, or how much

was caused by the extraordinary flood, a non-recoverable cause, or how much by the flood, a recoverable cause. Such a condition of the evidence prevents recovery. (*Perkins v. Payette*, 68 Minn. 152; 28 Am. Rep. 84; *Patton v. Ry.*, 179 U.S. 658; *Grant v. R. R.*, 31 N. E. 220-221; *Orth v. Ry.*, 47 Minn. 384, 50 N. W. 363; *Swanson v. Ry.*, 79 Minn. 398, 82 N. W. 670; *Briggs v. Ry.*, 52 Minn. 36, 53 N. W. 1019; *Searles v. Ry.*, 101 N. Y. 661, 5 N. E. 66; *Taylor v. City*, 105 N. Y. 202, 11 N. E. 642.) To meet this it is suggested that plaintiff would be entitled at least to nominal damages for one year. But the supreme court of this state has expressly decided that they will not reverse a judgment on the mere ground that the plaintiff might have been entitled to nominal damages. (*McCauley v McKeig*, 8 Mont. 389, 21 Pac. 22.)

MR. JUSTICE HOLLOWAY, after stating the case, delivered the opinion of the court.

It is conceded that the railway company constructed the fill in 1897 on its own land. It is alleged in the answer that this new fill was necessary to avoid "dangerous and difficult curves and grades and to avoid annoyance to public travel," and this is not denied.

Respondent railway company contends that the bill of exceptions was not served in the manner provided by law; but this objection is waived by the respondent presenting amendments to the proposed bill of exceptions. The purpose of the statute (Section 1831, Code of Civil Procedure) is to insure that the person upon whom service is sought shall actually receive, if possible, the document to be served; and when a party appears, and presents and has allowed his amendments to a proposed bill of exceptions, he is hardly in a position to say that he has never actually received a copy of the same.

Respondent also contends that the appeal should be dismissed for the reason that the notice of intention to move for a new trial is not in the record. This is untenable, first, for the reason that this is an appeal from a judgment, and not from an order

overruling a motion for a new trial; and, second, respondent's contention is disposed of adversely to it by the decision in *King v. Pony Gold Mining Co.*, 28 Mont. 74, 72 Pac. 309.

Respondent also contends that there was an extraordinary flood during 1898 and 1899, and that one Rockramer had placed a dike or embankment along the north bank of the Bitter Root river further west than respondent's new fill, and that this dike was, or may have been, the proximate cause of the damage to plaintiff's land. But neither of these facts appear from the record in this case sufficiently to deserve further consideration. At most there is but a hint of the existence of either.

The only serious question for determination is: Are these flood or overflow waters of the Bitter Root river, which, prior to 1897, flowed off over the lowland now crossed by respondent's new fill, to be treated as a part of a natural watercourse or as surface waters? And this question is to be resolved independently of the question whether the common-law rule or civil-law rule respecting the disposition to be made of these waters after their character is determined prevails in this state.

It must be conceded that, if these overflow waters are to be treated as the other waters of the Bitter Root river when within its banks and the low, bottom land across which defendant's right of way extends as a natural water course during flood times, then defendant had no right to interfere with the natural flow of such waters to the damage of plaintiff, and the court erred in granting a nonsuit.

1. Are these overflow or flood waters of the Bitter Root river to be treated as surface waters or as a part of the natural watercourse? The decisions are in hopeless conflict upon this subject, and no useful purpose can be served by a review of them. Upon the same state of facts different courts have decided the question differently. In Indiana, Missouri, Kansas, Nebraska and Washington it is held that these overflow waters are surface waters, to be dealt with as such according to the rule prevailing in those states. (*Cass v. Dicks*, 14 Wash. 75, 44 Pac. 113, 53 Am. St. Rep. 859; *Missouri Pac. Ry. Co. v.*

Keys, 55 Kan. 205, 40 Pac. 275, 49 Am. St. Rep. 249; *McCormick v. Ry. Co.*, 57 Mo. 433; *Morrissey v. Ry. Co.*, 38 Neb. 406, 56 N. W. 946; *Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114.)

In California, while a distinction is apparently made between overflow waters and surface waters, the common-law rule respecting surface waters is held applicable to overflow or flood waters. (*Gray v. McWilliams*, 98 Cal. 157, 32 Pac. 976, 21 L. R. A. 593, 35 Am. St. Rep. 163.)

“By the common law, flood water overflowing the banks of a stream is a part of the stream, though not flowing in a channel, and a riparian owner is not allowed to protect his lands by erecting barriers to the injury of another. This is clearly so in case the flood spreading beyond the banks of the stream forms with the stream one body, and flows within the accustomed boundaries of such floods.” (Jones on Easements, Sec. 729; *Rex v. Trafford*, 1 B. & Ad. 874; *Trafford v. Rex*, 8 Bing. 204.)

In Georgia, Ohio, Iowa, Virginia, Minnesota, South Carolina, Wisconsin and Tennessee it is held that these flood or overflow waters are still a part of the stream, and to be treated as such. (*O'Connell v. E. Tenn. etc. Ry. Co.*, 87 Ga. 246, 13 S. E. 489, 13 L. R. A. 394, 27 Am. St. Rep. 246; *Crawford v. Rambo*, 44 Ohio St. 279, 7 N. E. 429; *Sullens v. C. R. T. & P. R. R. Co.*, 74 Iowa, 659, 38 N. W. 545, 7 Am. St. Rep. 501; *Moore v. C. B. & Q. Ry. Co.*, 75 Iowa, 263, 39 N. W. 390; *Burwell v. Hobson*, 12 Grat. 322, 65 Am. Dec. 247; *Byrne v. M. & St. L. Ry. Co.*, 38 Minn. 212, 36 N. W. 339, 8 Am. St. Rep. 696; *Jones v. Seaboard Air Line Ry. Co.*, 67 S. C. 181, 45 S. E. 188; *Spelman v. City of Portage*, 41 Wis. 144; *Barden v. City of Portage*, 79 Wis. 126, 48 N. W. 210; *Carriger v. E. Tenn. etc. Ry. Co.*, 7 Lea, 388.)

While a federal court usually follows the decisions of the highest court of the state in which such federal court is held, especially with reference to questions of local law or practice, the United States Circuit Court for the District of Indiana first decided that this question is one of general law, and then re-

fused absolutely to follow the decisions of the Supreme Court of Indiana respecting this subject. The supreme court, in *Taylor v. Fickas*, above, and subsequently, held that these overflow waters are surface waters; but the federal court, after carefully reviewing these decisions, says: "The waters cast into a stream by ordinary floods must have a channel in which they are accustomed to flow, and, if they have, that channel is a natural watercourse, with which no riparian proprietor can lawfully interfere to the injury of another. If there is a natural waterway or course, and its existence is necessary to carry off the water cast into the stream by ordinary floods, that way is the flood channel of the stream; and, if it is the flood channel of the stream, the water which flows there cannot be regarded as surface water. Surface water is that which is diffused over the ground from falling rains or melting snows, and continues to be such until it reaches some bed or channel in which water is accustomed to flow. * * * It must necessarily follow from this general principle that, where water naturally flows, though the volume may change with the varying seasons, there is a natural watercourse, even though at times the place where the water flows in ordinary floods may become entirely dry. It can make no difference that the boundaries within which the water flows change with varying seasons, for the way which nature has provided for its flow is the stream, and water flowing in that waterway is not surface water. * * * With reasonably near approximation to accuracy, it may be laid down as a general rule that all the waters of a river which form one body when flowing within the boundaries within which they have been immemorially accustomed to flow in times of ordinary floods, constitute waters of the river, and are not surface waters." (*Cairo, V. & C. Ry. Co. v. Brevoort* (C. C.), 62 Fed. 129, 25 L. R. A. 527.)

The annual overflow of the Bitter Root river is caused by the melting of the snows in the mountains many miles from the land in controversy. The water is collected in the main channel, and carried down, until, by the addition of the waters of

its tributaries, the whole amount exceeds the capacity of the channel in which the waters of the river ordinarily flow when these floods or overflows occur. The source of supply in low water and high water is the same, the only difference being the quantity of water precipitated by that supply. We are of the opinion that great difficulty would be experienced in attempting to distinguish between the river waters proper and the overflow waters, where they form one continuous body, and in attempting to apply a particular rule to one and another rule to the other.

Without attempting to reconcile the diverse decisions, we are of the opinion that the following rule furnishes the safest guide for the determination of a question which has vexed the courts of many of our states as well as those of England, viz.: Whether the water from the overflow of streams is to be considered as still a part of the watercourse, or to be treated as surface water, shall depend upon the configuration of the country, and the relative position of the water after it has gone beyond the usual channel. If the flood water becomes severed from the main current, or leaves the same never to return, and spreads out over the lower ground, it becomes surface water. But if it forms a continuous body with the water flowing in the ordinary channel, or if it departs from such channel presently to return, it is to be regarded as still a part of the stream. (13 Am. & Eng. Ency. Law, 2d Ed., 687.)

Applying the foregoing definition to the facts of this case, we are of the opinion that the waters in question, which were obstructed by defendant's new fill or embankment, were a part of a natural watercourse.

2. Section 5152 of our Political Code provides: "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this state, or of the Codes, is the rule of decision in all the courts of this state." We are unable to find anything in the common-law rule respecting these waters or watercourses repugnant to or inconsistent with the Constitution

of the United States or the Constitution or statutes of Montana, and therefore hold that the common law must be enforced as the rule of decision in this case. This is the construction given by the courts of other states to a statutory provision similar to Section 5152, above. (*Edwards v. R. R. Co.*, 39 S. Car. 472, 18 S. E. 58, 39 Am. St. Rep. 746; *Cass v. Dicks*, *supra*; *McDaniel v. Cummings*, 83 Cal. 515, 23 Pac. 795, 8 L. R. A. 575.)

By this we do not mean to say that respondent may not maintain the whole or any part of the fill constructed in 1897. Its right with respect to this is limited by the provision that it shall provide suitable means of escape for the waters of the Bitter Root river at its ordinary flood or high water, so that plaintiff's land shall not, by reason of such fill, be compelled to bear any greater burden of such overflows than it bore prior to 1897. In other words, the railway company's right to maintain this fill is subject to the limitation imposed by the maxim "*Sic utere tuo*," etc., as liberally translated in our Civil Code, Section 4605: "One must so use his own rights as not to infringe upon the rights of another." (*Jones on Easements*, 729; *Crawford v. Rambo*, *supra*; *Sinai v. Railway Co.*, 71 Miss. 547, 14 South. 87.)

This is an ancient rule of the common law—not of the civil law, as contended by counsel—and, in our opinion, is particularly applicable to this case. It imposes no undue hardship upon the railway company, for in locating its right of way and in constructing its roadbed the company was bound to take notice of the known habits of the Bitter Root river, and to build with reference to them. If the view contended for by respondent be accepted, the railway company would be at liberty to fill up the remaining trestle west of the bridge, and would only be compelled to leave sufficient room under its bridge to accommodate the waters of the river itself as defined by its banks.

While the position taken by the trial court and by counsel for respondent finds support in the decisions of the highest courts of many of the states, we think the rule herein announced the

better one, and sustained by the decided weight of authority. The judgment is reversed and the cause is remanded.

Reversed and remanded.

SWAIN, APPELLANT, v. McMILLAN, RESPONDENT.

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(No. 1,886.)

(Submitted April 26, 1904. Decided May 25, 1904.)

*Deeds — Delivery—Escrow — Evidence—Burden of Proof—
Appeal — Transcript — Manner of Showing Error—Suffi-
ciency—Mortgages.*

1. A grantor in a deed placed in escrow, to be delivered in a specified time on the performance of certain conditions, brought suit to set aside the deed. At the close of plaintiff's case, defendant's motion for a nonsuit was granted. Pleadings and evidence examined, and *held*, that the motion for a nonsuit was rightly granted, since, under the pleadings, the burden of proof was on the plaintiff to prove his material allegations, and this he had failed to do.
2. Proof that a mortgage is of record is not proof that the mortgagee procured it to be recorded.
3. The phrase "deed of release," as used in Civil Code, Section 3845, means a writing, duly subscribed and acknowledged by the mortgagee, whereby he absolves the mortgaged property from the lien of the mortgage.
4. Where one appears of record to be the owner in fee of real estate, one alleging the contrary must prove the same by clear and convincing proof.
5. The transcript on appeal must show error directly, and not by way of inference or presumption.

Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

ACTION by John W. Swain against A. A. McMillan, as executor of Kind S. Batteiger, deceased. From a judgment granting a nonsuit, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Mr. J. E. Healy, for Appellant.

This is an action to quiet title, and the ten year statute applies. It is not an action to set aside a deed on the ground of fraud, for no fraud is alleged; it is an action merely to quiet title, for fraud is not the universal characteristic of the action; at best it is incidental. (*Oakland v. Carpentier*, 13 Cal. 552; *Wagner v. Law*, 28 Pac. 1114, 2 col. at bottom, *et seq.*; *Wilson v. Brookshire*, 9 L. R. A. 796.)

The elements of an estoppel by deed are: (1) It must be between the parties; strangers cannot take advantage of it. (2) It must be certain in its nature, and not open to ambiguity or double construction, and (3) It must be mutual. If any of the elements are lacking there can be no estoppel, but if all are present there is beyond question an estoppel. For a general discussion of the question of estoppel see Smith's Leading Cases, 9th Ed., 2056 *et seq.*; also 2010. The principal of estoppel by deed has always existed, and has run equally against the mortgagor and the mortgagee, as to provisions intended for them. (*Mitchell v. Kinnard*, 29 S. W. 309; Boone on Mortgages, Sec. 106; *Alexander v. Walter*, 8 Gill. 247; *Cecil v. Cecil*, 81 Am. Dec. 628; Ency. of Law, "Mortgages," page 1005, notes 4 and 5; Ency. of Law, "Estoppel," page 444; *Williston v. Watkins*, 3 Pet. 48; *Strong v. Waddel*, 56 Ala. 471; *Farris v. Houston*, 74 Ala. 169; *Scobey v. Kinningham*, 131 Ind. 557; *Carson v. Cochran*, 52 Minn. 67; *Upchurch v. Anderson*, 52 S. W. 917; *Second Nat'l Bank v. Gilbert*, 51 N. E. 584; *Collins v. Williams* (Tenn.), 41 S. W. 1056; *Voss v. Eller*, 109 Ind. 260; *Conklin v. Smith*, 7 Ind. 107; Washburn on Real Property, 6th Ed., Sec. 1101; *Fox v. Windes*, 127 Mo. 502; Smith's Leading Cases, 2106-2011; *Winn v. Strickland*, 16 So. 606.)

Upon the question of delivery. (*Richardson v. Gray*, 85 Iowa, 149; *Gloze v. Ins. Co.*, 87 Mich. 349; *Hutton v. Smith*, 55 N. W. 326; *Neel v. Neel*, 69 Pac. 163; *Schuffert v. Grote*, 88 Mich. 650; *Rittmeister v. Brisbane*, 35 Pac. 736; *Tyler v. Hall*, 106 Mo. 313; Webb on Record of Title, Sec. 144, and cases cited.)

The record of conveyance is intended for third parties and

not for parties to any transaction; much less for those who are not parties. (Webb on Record of Title, Sec. 144; *Taylor v. Holter*, 1 Mont. 712; *McAdow v. Black*, 1 Pac. 751.)

A deed of release was the original way of releasing a mortgage; and the statute, recognizing this very thing, has said that the satisfaction properly executed, as this one is shown to be, shall have the same effect as a deed of release, duly acknowledged and recorded. If this deed of release is denied the effect of a deed of release, we find the statute read away. A deed of release is defined by Devlin on Deeds, Sections 16 and 17, to be a deed, the operative words of which are "remise, release and forever quitclaim." A deed of quitclaim and release is as effectual to pass a present and existing interest as any other kind of deed. (*Spaulding v. Bradley*, 22 Pac. 47; *Packard v. Johnson*, 4 Pac. 632.)

The rule is once a mortgage always a mortgage. (Washburn on Real Property, Sec. 998, and cases cited (6th Ed.); Compiled Laws, First Division, Sec. 371; Washburn on Real Property, Sec. 999, and cases cited; *Starr v. Kaiser*, 68 Pac. 523.)

Messrs. McBride & McBride, for Respondent.

MR. COMMISSIONER CALLAWAY prepared the following opinion for the court:

Suit in equity. In his complaint plaintiff alleged himself to be the owner in fee and entitled to the possession of an undivided one-fifth interest in the Greendale placer, and that the defendant Kind S. Batteiger claimed an interest therein adverse to the plaintiff which arose out of the following facts and circumstances: That on November 10, 1890, the plaintiff placed in escrow for a period of six months a deed conveying the said premises to the defendant and one Cluett, which deed was to be delivered to them upon the performance of certain conditions; that the terms of the escrow agreement were never performed, and the deed was never delivered; that the title to the said property then and ever since has remained in the plain-

tiff, but that thereafter, and by some means unknown to the plaintiff, the defendant became possessed of the deed, and caused the same to be recorded on January 24, 1893, paying no consideration of any kind therefor, and knowing that no consideration was ever paid or rendered by any person therefor; that on January 12, 1895, defendant obtained from Cluett a deed for an undivided one-tenth interest in said property, and caused the deed to be recorded; that patent to the said property was issued May 12, 1892; that defendant had paid certain taxes on the property, which plaintiff offered to repay; that the title of the defendant is without right; and that said defendant has no estate, right, title or interest in said premises, or any part thereof, except to the extent of the taxes paid by him. Plaintiff prayed that defendant be required to set forth the nature of his claim, and that it be adjudged that the defendant has no interest or estate in said property, and that the title of plaintiff is good and valid. The defendant denied plaintiff's ownership, admitted his own claim of title, and alleged that the terms of the escrow agreement were performed, that the deed was delivered to defendant by and with the knowledge and consent of the plaintiff, and that the plaintiff was paid the entire consideration therefor. He further alleged that the plaintiff was guilty of laches in bringing this action, and also that the action is barred by the statute of limitations. Plaintiff filed a reply in which he denied the affirmative matter set up in the answer, and alleged, as an estoppel against the defendant, that on July 10, 1891, the defendant caused the plaintiff to execute to him a certain mortgage deed for the described premises, which contained the express agreement that, in case a surveyed division of the said claim be made between the owners thereof, "this mortgage shall attach to and run against and be upon that portion owned by the said John W. Swain," and that defendant placed the mortgage of record on July 18, 1891.

At the trial the plaintiff introduced the following documentary evidence: The record of a United States patent showing the Greendale placer to have been conveyed by the government

to plaintiff, defendant and three others. The record of a mortgage purporting to have been executed and delivered by plaintiff to defendant to secure a note made payable to James A. Murray. This note appears to have been signed by A. F. Bray and plaintiff. The mortgage was dated July 10, 1891, and filed for record July 18th following. The mortgage record showed that on May 23, 1896, the defendant entered thereon the following satisfaction: "For value received I hereby certify and declare that this mortgage, together with the debt thereby secured, is fully paid, satisfied and discharged." The record of an instrument dated September 29, 1893, executed by defendant to Archibald A. McMillan, purporting to be an assignment for the benefit of defendant's creditors, and to convey all his estate, "real and personal, and his chattels, effects, debts and choses in action." It specifically mentioned an undivided one-fifth interest in the Greendale placer. The record of a deed executed by McMillan reconveying to defendant the property mentioned in the instrument of September 29, 1893. The record of a deed dated November 10, 1890, purporting to have been executed by plaintiff to defendant, and one Cluett, conveying to them an undivided one-fifth interest in the Greendale placer for a consideration of \$600. It was recorded January 24, 1893. The record of a deed dated November 12, 1895, purporting to have been executed by Cluett to defendant, conveying to the latter an undivided one-tenth interest in the Greendale placer.

No oral testimony was introduced, except that which pertained to the introduction of the deeds and to the payment of taxes. Plaintiff offered to repay to defendant the amount which the latter had paid for taxes upon the premises in controversy. Plaintiff did not testify. At the close of plaintiff's case defendant moved for a nonsuit, which was granted, and judgment was thereupon entered. Plaintiff moved for a new trial, which was denied. Defendant having died, Archibald A. McMillan, his executor, was substituted for him. This appeal is from the judgment and order denying plaintiff's motion for a new trial.

The gist of the foregoing is that the plaintiff made a deed, and placed it in escrow, to be delivered in six months upon the

performance of certain conditions. He alleges these conditions were never performed. Defendant alleges that they were. Plaintiff alleges that the deed was never delivered. Defendant alleges that it was. Plaintiff alleges that thereafter, and by some means unknown to him, the defendant became possessed of the deed, paying or rendering no consideration therefor. The defendant alleges that plaintiff was paid the entire consideration for the deed, and that it was delivered in accordance with the escrow agreement, and by and with the knowledge and consent of plaintiff. All of these were material allegations on the part of plaintiff, and all were denied. The burden was upon the plaintiff to prove them, and this he failed to do. The only evidence which he produced, as we have seen, was documentary. From this evidence he says certain legal presumptions should be drawn. For instance, he says that, since defendant caused plaintiff to execute the mortgage on July 10, 1891, two months after the six-months escrow period had expired, it must be taken as conclusive that the deed had not then been delivered. In this connection it must be remembered that the first mention of this mortgage and its recordation appears in plaintiff's reply as new matter, and is deemed denied by defendant. (Code of Civil Procedure, Sec. 754.)

Plaintiff failed to prove that defendant caused him to execute the mortgage, or that defendant placed it of record. The fact that it was of record was not proof that defendant placed it there. But conceding that plaintiff did prove his allegations with respect to the mortgage, it may have been that the escrow deed was delivered after the mortgage was given, and in satisfaction thereof. The mortgage does not indicate the defendant's interest therein. The note which it was given to secure is a note in which defendant had no apparent interest. It was executed by A. F. Bray and plaintiff to James A. Murray, and was due in six months from date. Why the mortgage was given to defendant to secure this note is one of the things which the record fails to show. The explanation of this which counsel for plaintiff makes is that defendant advanced the money and the note

was delivered to him, being made payable to his (defendant's) banker, Murray. It may be that the time for the performance of the escrow condition was extended by the parties, and that the deed was afterwards delivered in pursuance of such extension. It may not have been delivered until January 24, 1893, when it was placed on record.

Plaintiff also argues that defendant acknowledged that he had no interest in the property when he caused the mortgage to be canceled on May 23, 1896, and relies upon Section 3845 of the Civil Code, which reads as follows: "Any mortgage that has been or may be hereafter recorded may be discharged by an entry in the margin of the record thereof, signed by the mortgagee or his personal representative or assignee, acknowledging the satisfaction of the mortgage in the presence of the county clerk, or his deputy, who shall subscribe the same as a witness. Such entry shall have the same effect as a deed of release duly acknowledged and recorded." Particular stress is laid upon the words "deed of release," counsel claiming that a deed of release means a deed which has the effect of conveying title.

It is well to note the character of the mortgage itself. A "mortgage is a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession." (Civil Code, Sec. 3810.) "The lien of a mortgage is special, unless otherwise expressly agreed, and is independent of possession." (Civil Code, Sec. 3812.) A mortgage does not create an estate in real property. "It is a mere security for the payment of a debt or the fulfillment of an obligation, and is only a chattel interest. (*Gallatin County v. Beattie*, 3 Mont. 173; *Holland v. Board of Commissioners*, 15 Mont. 460, 39 Pac. 575, 27 L. R. A. 797.) While it affects lands by imposing a lien or charge upon them, it in no wise conveys title thereto." (*Hull v. Diehl*, 21 Mont. 71, 52 Pac. 782; *Wilson v. Pickering*, 28 Mont. 435, 72 Pac. 821.)

The ordinary signification of the word "deed" is given by the Century Dictionary as "that which is done, acted, per-

formed or accomplished." Abbott's Law Dictionary says: " 'Deed' is somewhat used in jurisprudence in its general, vernacular sense of an act; something done. More frequently it has a technical meaning, denoting (1) a written instrument under seal; and (2), and more specifically, a conveyance. In the first and broader of these meanings, 'deed' includes all varieties of sealed instruments. Even bonds and executory contracts under seal may be included by the term, and still more clearly may assignments, leases, mortgages and releases." And see Devlin on Deeds, Sec. 5; Black's Law Dictionary; *American Insurance Co. v. Avery*, 60 Ind. 566.

"Release" is thus defined by the Century Dictionary: "In law, a surrender of a right; a remission of a claim in such form as to estop the grantor from asserting it again. An instrument by which a creditor or lienor discharges the debt or lien, or frees a particular person or property therefrom, irrespective of whether payment or satisfaction has actually been made. Hence usually it implies a sealed instrument."

Manifestly, the phrase "deed of release," as used in the statute, means a writing, duly subscribed and acknowledged by the mortgagee, whereby he absolves the mortgaged property from the lien of the mortgage.

The satisfaction of the mortgage which defendant entered on May 23, 1896, may have been made simply for the purpose of clearing the record, and defendant may have at that time been the owner in fee of the property included in the mortgage. Such action by defendant would be entirely consistent with his ownership. Surely no owner desires to have his title apparently incumbered with a mortgage, although that instrument be null.

Another fact from which we are asked to draw an inference against the defendant is that on September 29, 1893, he executed an instrument purporting to convey all of his property to McMillan for the benefit of defendant's creditors. In this instrument it appears that defendant only included an undivided one-fifth interest in the Greendale placer, when, as a matter

of fact, he owned a three-tenths interest therein, according to the records; that is, he owned one-fifth interest according to the terms of the patent, and one-tenth interest according to the terms of the deed executed by plaintiff to himself and Cluett. It must be remembered, however, that the one-fifth interest conveyed to defendant and Cluett by plaintiff was conveyed to them jointly, and defendant may have omitted such one-tenth interest thoughtlessly.

Plaintiff says that the defendant is estopped from alleging that he was the owner of more than an undivided one-fifth interest in the Greendale placer by the execution of his instrument of assignment dated September 29, 1893. In that instrument he made mention of an undivided one-fifth interest only. He also failed to mention the mortgage from plaintiff to himself, which secured a note of \$600. Did he exclude that, also, according to plaintiff's theory?

Thus all the defendant's actions may be explained reasonably and consistently with honest dealing. Plaintiff seems to overlook the fundamental principle that, when one appears of record to be the owner in fee of real estate, another alleging the contrary must show the fact by clear and convincing proof. It was incumbent upon plaintiff to show the actual facts existing, and this he has failed to do. Error must be made out affirmatively. It will not be presumed. (*State v. Mott*, 29 Mont. 292, 74 Pac. 728; *Merryman v. Bourne*, 9 Wall. 592.) The transcript must show the error directly, not by way of inference or presumption. (*Rumney Land & Cattle Co. v. Detroit & Montana Cattle Co.*, 19 Mont. 557, 49 Pac. 395.)

We are of the opinion that the judgment and order should be affirmed.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

MR. CHIEF JUSTICE BRANTLY, not having heard the argument, takes no part in this decision.

STATE EX REL. CLARK, RELATOR, v. DISTRICT COURT
OF THE SECOND JUDICIAL DISTRICT
ET AL., RESPONDENTS.

(No. 2,072.)

(Submitted May 25, 1904. Decided May 26, 1904.)

*Courts—Supreme Court—Supervisory Control Over District
Courts—Exercise—Remedy by Appeal—Adequacy.*

1. By a rule of the district court of Silver Bow county, all matters of a criminal nature were to be heard in Department 3 of that court. An accusation under Penal Code, Section 1531, was filed in Department 1, and the judge of that department denied an application for the transfer of the cause to Department 3. *Held*, that the supreme court would not issue a writ of supervisory control to compel the removal of the case to Department 3, where it did not appear that, if Department 1 should proceed to a determination of the accusation, accused would suffer any injury for which an appeal would not furnish an adequate remedy.
2. The supervisory control power was vested in the supreme court, not for the purpose of interfering at every stage of the proceedings in the district court and directing the conduct of the business there, but only under extraordinary circumstances, where there is no other remedy and a party litigant is, by some wrong committed by the court, liable to suffer irreparable injury.

APPLICATION for a writ of supervisory control by the state, on the relation of William D. Clark, against the Second judicial district court and Hon. E. W. Harney, judge. Writ denied.

Mr. C. F. Kelley, and *Mr. E. S. Booth*, for Relator.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Application for writ of supervisory control. Under one of the rules adopted by the district court of Silver Bow county for the dispatch of business, all criminal causes and all matters of a criminal nature are assigned for hearing and determination to Department 3 of said court. The court consists of three departments, each presided over by a separate judge. About December 23, 1903, Hon. E. W. Harney, one of said judges, who

presides over Department 1 of the court, called a grand jury for the purpose of inquiring into the official acts of the various county officers of Silver Bow county, and such other matters as might fall within the cognizance of a grand jury. The jury was duly impaneled, and has been in session from time to time since December 23d until the present time. On April 23, 1904, the grand jury returned into court, and presented, for the purpose of having the same filed, an accusation charging the relator herein with official misconduct, and demanding that on account thereof he be removed from his office of county commissioner of Silver Bow county. Said accusation charged that the relator had been guilty of willful and corrupt misconduct and malfeasance in office, constituting criminal offenses under the Penal Code of the state of Montana, and justifying the court, if the charges were found to be true, in summarily removing the relator from office. Notice of the filing of said accusation was by the county attorney served upon the relator, together with a copy thereof, requiring him to appear before Department 1 of said district court, before E. W. Harney, judge, on May 13, 1904, to answer. At the time specified in the notice the relator appeared, and, by motion in writing, duly requested said Harney to make an order transferring the matter of the accusation to Department 3 of said court for all further proceedings to be had therein, in accordance with the rules of said court. This motion, after argument and consideration, was denied, and the said Harney thereupon proceeded to take jurisdiction and try said matter in Department 1.

It is charged in the petition that the action of said Harney in refusing to transfer the cause, and in assuming jurisdiction thereof, and in proceeding to hear and determine it in Department 1 of the said court, is in plain violation of the rule of court established to regulate proceedings in said court, and is a violation and abuse of judicial discretion, and that the said Harney is acting in excess of his lawful authority and jurisdiction as judge of said court. It is further alleged that relator has no plain, speedy or adequate remedy at law or by appeal, and that,

unless this court interferes by its supervisory power to compel said Harney to observe the rule prescribed for the assignment of the business of said court, he will continue to violate said rule, and proceed to hear and determine the cause in Department 1 of said court, to the prejudice, damage and irreparable injury of relator.

The only question presented is whether or not this court is justified in using its extraordinary power at this stage of the proceedings in the district court to compel the presiding judge to obey one of the rules of that court.

The accusation was presented against the relator under the authority of Section 1531 of the Penal Code. The chapter of that Code in which this section is found authorizes proceedings for the removal of district, county, township and municipal officers for corrupt misconduct or malfeasance in office, and prescribes the mode of procedure to be pursued. Section 1543, found in the same chapter, provides: "From a judgment of removal an appeal may be taken to the supreme court, in the same manner as from a judgment in a civil action, but until such judgment is reversed, the defendant is suspended from his office. Pending the appeal, the office must be filled as in case of a vacancy."

The theory of the relator's application is that when a district court has adopted rules, under the provisions of Section 111 of the Code of Civil Procedure, "for its own government and the government of its officers," such rules have the force and effect of statute law, and may not be disregarded by the judges or the officers. He relies upon the decisions of this court to support the position which he assumes. (*Montana Ore Purchasing Co. v. Boston & Montana C. C. & S. M. Co.*, 27 Mont. 288, 70 Pac. 1114; *State ex rel. King v. District Court*, 25 Mont. 202, 64 Pac. 352.) Assuming, without deciding, that the rule in question is so far binding upon the court as to give to litigants and those charged with crimes the right to be tried by one of the judges to the exclusion of the others, nevertheless we do not think that at this juncture in the proceedings this

court should interfere. The power of this court now invoked was vested in it, not for the purpose of interfering at every stage of the proceedings in the district court, and directing the conduct of the business there, but only under extraordinary circumstances, where there is no other remedy, and a party litigant is, by some wrong committed by the court, liable to suffer irreparable injury. In this case it does not appear that, if the court proceeds to a determination of the accusation, the relator will suffer any injury or wrong for which an appeal will not furnish him an adequate remedy. It is true that, if found guilty, he will be ousted from office pending his appeal to this court, and such result will fix his status in the meantime. The possibility of this result, however, does not justify this court in using its extraordinary power to grant him relief. This court cannot anticipate that he will be convicted, or that during the progress of the trial he will not have afforded to him every opportunity to make his defense. If it be prejudicial for Judge Harney to sit in the cause and try it in violation of the rule, such error would be available on appeal, and would result in a reversal of the judgment.

The application presents a question very similar to the one presented in the case of *State ex rel. Shores v. District Court*, 27 Mont. 349, 71 Pac. 159, in which this court was asked for a writ to compel the district court of Silver Bow county, Hon. John B. McClernan presiding, to vacate an order setting a disbarment proceeding for trial, and directing the district judge to grant a postponement to enable the accused to prepare for trial. With reference to it, it was said: "If the judgment in the case should be adverse, an appeal from it would furnish a remedy as complete and adequate as the court can furnish in any case, and would be preventive of any wrong whatever, except such as would be an incidental result of any erroneous judgment, for which, owing to the imperfection of human institutions, no remedy has as yet been devised, except to correct it by the ordinary procedure in the trial court, or upon review by the appellate court."

This view renders it unnecessary to decide how far the judges of the district courts may circumscribe and limit the discretion vested in them by law to regulate the arrangement of the calendar and the assignment of causes for hearing by the adoption of such a rule as the one in question.

The writ is denied.

Writ denied.

30	446
32	389
32	390

30	446
33	317

30	446
36	29

CHRISTIANSEN, RESPONDENT, v. ALDRICH ET AL.,
APPELLANTS.

(No. 1,857.)

30	446
37	419
37	520

(Submitted April 19, 1904. Decided May 28, 1904.)

*Specific Performance—Complaint—Adequate Remedy at Law
—Tender—Amendment — Appeal—Technical Objections—
Harmless Error.*

1. Where a complaint alleged breach of a contract to convey land described therein, it was sufficient to raise the presumption that pecuniary compensation would not afford adequate relief, within Civil Code, Section 4410, Subd. 2, though there was no allegation of special circumstances showing that plaintiff had no adequate remedy at law.
2. In an action for specific performance of a contract to convey land, it was not necessary that the complaint should allege that defendants were the owners of the land at the time the contract was made, since, if defendants were not the owners, or had placed themselves in such a position that they could not perform their contract, such facts were matters of defense.
3. In a suit for specific performance, an answer alleging that, since the contract was made, defendants had conveyed the land in controversy to another, constituted an admission that defendants were the owners of the land at the time the contract was made.
4. Under Code of Civil Procedure, Section 778, a technical objection to a complaint in a suit for specific performance not affecting the substantial rights of the parties is not available after judgment.
5. Where, in a suit for specific performance, it was alleged that defendants had withdrawn the deed from escrow, and it appeared that a tender of the balance of the price would not have been accepted and would have been of no avail, and plaintiff tendered the money in court, paid the same to the clerk, and demanded a deed, defendants having removed from the state and being absent at the time plaintiff desired to make payment, it was no objection that the complaint failed to allege a tender of the balance of the price before suit brought.

6. Where, in a suit for specific performance, defendant admitted the making of the contract, and relied on a defense other than the statute of frauds to defeat the action, such statute was not available as a defense unless specially pleaded.
7. Where, in a suit for specific performance, plaintiff pleaded a breach of the contract, and defendant alleged that plaintiff had failed to perform within the time prescribed, whereupon defendant had sold the land to W., but did not allege whether the sale to W. was before or after the commencement of the action, nor state any facts with reference to the consideration paid by W., and his notice of plaintiff's equity, the answer did not set up sufficient new matter to require replication.
8. In a suit for specific performance, plaintiff, pending a motion for judgment on the pleadings, applied for leave to amend the complaint by adding an allegation of tender of the unpaid purchase price, and a demand for a deed, and by making an allegation of readiness and willingness to perform more specific. *Held*, that the application was properly granted, defendants having declined the court's offer to postpone the hearing to the next term.
9. Where, after a trial amendment, the case proceeded and was tried upon the issues formed by the amended complaint and answer, and it appeared that defendants were afforded every opportunity to present their entire case, the fact that the amendment was not formally incorporated in the complaint was not reversible error.

Appeal from District Court, Chouteau County; John W. Tattan, Judge.

ACTION by Charles Christiansen against William G. Aldrich and another. From a decree in favor of plaintiff, and from an order denying a motion for a new trial, defendants appeal. Affirmed.

STATEMENT OF THE CASE.

This action was brought to enforce specific performance of a contract to convey certain real and personal property, consisting of farm lands in Chouteau county, and shares of the capital stock in an irrigation company. The complaint alleges, in substance, that under the terms of the contract which was entered into by the plaintiff and defendants on October 14, 1899, the plaintiff was to pay for the property the sum of \$3,200—\$1,100 upon that date, and the balance within a reasonable time—and defendants were to execute a deed and put it in escrow in the Stockmen's National Bank at Fort Benton, Montana, to be delivered to the plaintiff upon his payment of the balance of the purchase price to the bank; that the cash installment was paid and the deed executed and deposited in ac-

cordance with the terms of the agreement; that an error was made in the deed with reference to a certain water right used upon the land, and that on or about October 24, 1899, it was withdrawn from deposit for correction; that it was corrected, but that the defendants obtained possession of it, and never returned it to the depositary; that defendants have refused to convey the property; and that the plaintiff stands ready and willing to perform his part of the contract and make final payment whenever a deed is tendered him or deposited with the bank according to the agreement.

The defendants admit the making of the contract as alleged in the complaint, except that it is averred that the deferred payment was to be made within seven days after the deposit of the deed. It is admitted that the cash installment was paid, and that the deed was withdrawn from deposit for the purpose of correction; but it is alleged that it was thereupon returned to the bank, and remained there until after the expiration of the time allowed for payment, and after repeated, though fruitless, demands made upon the plaintiff for payment under the terms of the agreement, whereupon it was withdrawn. It is further alleged that about the middle of July, 1900, the defendants sold and conveyed the property to one Winters, who at once entered into the possession of it, and has been the owner of it and in possession since the conveyance was made to him.

There are in the pleadings allegations of both plaintiff and defendants of damages sustained by them, respectively, by failure on the part of the other to observe the terms of the contract; but the issues thus presented were mutually abandoned, and it is not necessary to notice them.

The plaintiff's replication does not either generally or specifically deny that the terms of the contract were as alleged in the answer.

The action was commenced and a notice of *lis pendens* filed under the statute of July 9, 1900. The cause came on for trial on these pleadings on May 31, 1901. The defendants moved for judgment on the pleadings. The grounds of the motion

are not stated, but we gather from the briefs of counsel that they were that the complaint does not state a cause of action, and that substantial new matters of defense alleged in the answer are not denied in the replication. Pending the motion, counsel for plaintiff asked leave, and were permitted, over objection of defendants, to amend the complaint by inserting therein the following: "That the plaintiff is now and since April 1, 1900, has been ready, anxious and willing to pay to the defendants the said balance sum due on the purchase price of said lands, and now to the defendants tenders said sum, to-wit, \$2,100, and pays the same into court for the use of the defendants, and the plaintiff now demands the execution and delivery of said deed." Counsel then tendered to defendants and paid to the clerk the balance of the purchase price. The motion for judgment was then denied. Counsel for defendants then moved for a continuance on the ground that they were not ready to meet the allegations contained in the amendment. The court, after stating that the hearing would be continued upon a showing of surprise by defendants, and counsel having declined to make such showing, denied the motion. Counsel then asked that they be allowed the statutory time in which to file amended answer after service of the amendment. This motion was also denied, the court stating that, if counsel desired, the hearing would be postponed for twenty-four hours. The court further stated that it was of the opinion that the amendment to the complaint was already sufficiently met by the allegations and denials of the answer. Thereupon objection was made to the introduction of evidence on the ground that the amended complaint failed to state a cause of action. This objection was overruled. The trial was then had, resulting in findings and a judgment in favor of the plaintiff, requiring the conveyance to be executed and delivered to plaintiff; omitting, however, the shares of stock, any claim to which plaintiff expressly waived. From the judgment and an order denying their motion for a new trial, the defendants have appealed.

The grounds of the appeals are that the rulings referred to, with certain others upon the admissibility of evidence, were

prejudicial to the defendants; that the judgment is not sustained by the pleadings; and that the findings are not sustained by the evidence.

Messrs. Downing & Stephenson, for Appellants.

Under the statutes of this state, and the general law on the subject, plaintiff has failed to state a case in his complaint. (Civil Code, Secs. 4410, 4418, 4417; *Wickham v. Barker*, 82 Cal. 46; *Clary v. Folger*, 84 Cal. 316; *Mayger v. Cruse*, 5 Mont. 497; *Wolf v. Great Falls, etc. Co.*, 15 Mont. 62; *Henderson v. Hicks*, 58 Cal. 364; Am. Dec. Vol. 54, page 132 and note; *Williams v. Marshall*, 19 Cal. 448; *Goodale v. West*, 5 Cal. 339; *Kinthead v. Shreve*, 17 Cal. 275; *Gray v. Daugherty*, 25 Cal. 279; *Doyle v. Teas*, 5 Ill. 202; *Bradford v. Foster*, 87 Tenn. 4; *Englander v. Rogers*, 41 Cal. 230; *Senter v. Davis*, 38 Cal. 450.)

The evidence introduced by the plaintiff does not show sufficient facts to sustain his complaint or authorize the court to grant the relief asked. (*Wolf v. Great Falls, etc. Co.*, 15 Mont. 62; Civil Code, Sec. 2342; *Ducie v. Ford*, 8 Mont. 240; *Jenkins v. Harrison*, 66 Ala. 345; 21 Am. Rep. 245; 36 Am. Dec. 87; 54 N. E. 1019, 181 Ill. 633; *Forrester v. Flores*, 64 Cal. 24.)

Mr. W. B. Sands, and *Mr. George H. Stanton*, for Respondent.

MR. CHIEF JUSTICE BRANTLY, after stating the case, delivered the opinion of the court.

1. It is argued that the complaint does not state a case for specific performance, within the purview of Section 4410 of the Civil Code. In this we think counsel are in error. It is true, the facts and circumstances stated do not bring it within the provisions of subdivisions 1, 3 and 4 of this section; but the allegation of a breach of the contract to convey the land

described is itself sufficient to raise the presumption that pecuniary compensation would not afford adequate relief. This brings the case within subdivision 2 of the section. It is not necessary for the plaintiff to allege special circumstances showing that he has no adequate remedy at law. (*Ide v. Leiser*, 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 17; *Baumann v. Pinckney*, 118 N. Y. 604, 23 N. E. 916; Pomeroy, Equity Jurisprudence, Secs. 221, 1402; Civil Code, Sec. 4413.) Whether specific performance of a contract to purchase land will be compelled in the particular case depends upon the circumstances, and the relief will be granted or withheld, in the discretion of the court, though the plaintiff may have another remedy at law. (*Baumann v. Pinckney*, *supra*; *Brown v. Haff*, 5 Paige, 235, 28 Am. Dec. 425.)

It is argued that the complaint is defective in failing to allege that the defendants were the owners of the land in controversy at the time the contract was made. If it be a fact that the defendants entered into a contract which they could not perform, or that, since it was made, they have placed themselves in such a position that they cannot perform it, this is a matter of defense, and the duty to allege and prove it devolves upon them. (*Ide v. Leiser*, 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 17; *Greenfield v. Carlton*, 30 Ark. 547; Waterman on Specific Performance, 89.) Conceding, however, that it should appear from the complaint that the defendants were the owners at the time the contract was made, and that the complaint is defective in failing to allege this fact, the answer of defendants aids the complaint by the allegation that since the contract was made the defendants have sold and conveyed the land in controversy to one Winter, who is now the owner and in possession of it, and has been since the said conveyance was made to him. This allegation carries with it the admission that the defendants were the owners at the time the contract was made, and thus cures the defect in the complaint. (*Lynch v. Bechtel*, 19 Mont. 548, 48 Pac. 1112.) Though the complaint might have been held bad on demurrer, yet, this admission being made, and

the court having found for the plaintiff and entered a decree in his favor, the defendants may not be heard to urge on appeal that the complaint is fatally defective. (*Hershfield & Bro. v. Aiken*, 3 Mont. 442; *Duignan v. Montana Club*, 16 Mont. 189, 40 Pac. 294; *Murphy v. Phelps*, 12 Mont. 531, 31 Pac. 64; *Northrop v. Boone*, 66 Ill. 368.) At best, the objection is technical, and does not affect the substantial rights of the parties. It must therefore be disregarded, as falling within the spirit of Section 778 of the Code of Civil Procedure.

It is said that the complaint is defective for failing to show a tender of the balance of the purchase money before the action was brought. It is undoubtedly the general rule that, if a part of the purchase price is still due and payable, the plaintiff seeking to have the conveyance compelled must allege and prove a tender of it, and bring it into court. But the rule is not invariable. An exception to it is where it is apparent from the pleading that a tender would be useless. "Where the vendor claims to have rescinded, repudiates and denies the obligation of the contract, placing himself in such a position that it appears that, if the tender were made, its acceptance would be refused, then no tender need be made by the vendee. * * * In such case it is enough if the plaintiff offer by his bill to bring in the money when the amount is liquidated and he has his decree for performance." (*Brock v. Hidy*, 13 Ohio St. 306. See, also, *Deichmann v. Deichmann*, 49 Mo. 107; *Crary v. Smith*, 2 N. Y. 60; *Hunter v. Daniel*, 4 Hare's Eq. 420; 20 Ency. Pl. & Pr. 455; *Tobin v. Larkin*, 183 Mass. 389, 67 N. E. 340.)

The complaint alleges that the defendants violated their contract by withdrawing the deed from the bank and refusing to make the conveyance. It is clear from this statement that a tender would have been useless. The bank was authorized to hold the deed subject to the order of the defendants upon payment of the balance of the purchase price. Plaintiff could make the tender to the bank only. When the deed was withdrawn, the bank was no longer authorized to receive payment, nor was

there any other person authorized to receive it under the terms of the contract. A tender to the bank, therefore, would have been a mere form, and of no avail. The plaintiff was not bound to hunt up the defendants and tender it to them. Furthermore, the plaintiff tendered the money in court, paid it to the clerk, and demanded the deed. He thus submitted himself to the court for all purposes in the case. (*Hunter v. Daniel, supra.*) Under the circumstances, this is sufficient—especially so, since it appears from the evidence that the defendants had removed from the state, and were absent at the time when plaintiff desired to make the payment.

2. Again, it is urged that the contract is void under Section 2342 of the Civil Code, which declares “that no agreement for the sale of real property or any interest therein is valid, unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or his agent thereunto authorized in writing.”

The defendants in their answer admit the making of the contract, but rely upon the defense that the plaintiff breached it on his part by his failure to pay the balance of the purchase price within seven days, the time in which they allege payment should have been made; and, as a counterclaim, they allege damages for this breach, and ask judgment for the amount alleged. The statute is not pleaded, and, so far as the record shows, the defendants did not in the district court rely upon it. They cannot now avail themselves of this defense. The rule prevails in this state that, where the making of the contract alleged in the complaint is put in issue by the answer, the defendant may avail himself of the statute without pleading it. (*Ryan v. Dunphy*, 4 Mont. 342, 1 Pac. 710; *Sweetland v. Barrett*, 4 Mont. 217, 1 Pac. 745; Code of Civil Procedure, Secs. 3270, 3274.) A different rule applies, however, when the making of the contract is admitted, as in this case, and other defenses are relied upon to defeat the action. In such case the statute is not available unless specially pleaded. (*Maybee v. Moore*, 90 Mo. 340, 2 S. W. 471; *Iverson v. Cirkel*, 56 Minn. 299, 57 N. W. 800;

Connor v. Hington, 19 Neb. 472, 27 N. W. 443; *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. 220; *Duffy v. O'Donovan*, 46 N. Y. 223; *Cozine v. Graham*, 2 Paige, 177.) It is therefore not necessary to consider whether the contract is within its terms.

3. The next point urged is that the court should have granted the defendants' motion for judgment on the pleadings, because new matter set up in the answer was not put in issue by the replication. This point is disposed of by the remark that nothing alleged in the answer, except the counterclaim for damages for breach of the contract, required a replication. As noted in the statement of facts, this feature of the case was by stipulation abandoned at the hearing. The allegations of the answer, except in one particular, amounted to no more than an issue upon the averments in the complaint. With reference to this feature of it—the alleged sale to Winter—it may be said that the allegations are not sufficient to state a defense, in that it does not appear therefrom whether the sale was made before or after the commencement of the action, nor what were the facts as to consideration paid by Winter, and his notice of plaintiff's equity. If it was made before the commencement of the action, the defendants could not perform the contract. If made after that time, and the filing of a notice of *lis pendens* by the plaintiff, it would not affect plaintiff's rights, nor aid the defendants. To avoid the merits of the action, therefore, the allegations should be specific in their statements, so as to inform the court what were the facts, and it could know whether it might properly deny the relief demanded. The court properly overruled the motion for judgment.

4. Error is alleged upon the action of the court in permitting the amendment to the complaint pending defendants' motion for judgment on the pleadings, and then denying defendants' motion for a continuance. The amendment was properly allowed. The only substantial addition made by it to the complaint was the tender of the unpaid purchase price and the demand for the deed; otherwise its effect was to render more spe-

cific the allegation of the readiness and willingness on the part of the plaintiff to perform the contract on his part. It does not appear from the record that the defendants were not able to meet the allegations contained in the amendment, or that they were put to a disadvantage by it. Indeed, it appears, on the contrary, that they were fully prepared to try the case on its merits. The court offered to postpone the hearing until the next term, if the defendants would make it manifest that they were not ready to proceed with the trial. This they, through their counsel, declined to do. If the trial had proceeded without the amendment, until the proofs were all in, and an application had been made to amend, the court should have allowed it, so as to make the pleadings conform to the proof.

Counsel insist that the amendment should have been formally incorporated in the complaint, that they should have been served with a copy, and that they should have been allowed the statutory time of twenty days in which to file an amended answer. It is true that the amendment should have been incorporated in the complaint. Yet the trial proceeded as if such had been the case, upon the issues framed by the amended complaint and the answer, which put them in issue. The trial was upon the merits, with full opportunity, so far as the record shows, for the defendants to present all the evidence they had touching the controversy. Such being the case, the judgment should not be reversed now upon the purely technical irregularity in the proceedings of the court with reference to the amendment. (Code of Civil Procedure, Sec. 778.)

5. As to the point that the evidence does not justify the findings, we are of the opinion that it is amply sufficient. The only controversy in the case arose upon the question whether the plaintiff was to make the payment within a reasonable time, as alleged by the plaintiff, or strictly within the seven days, as alleged by the defendants. In support of his position the testimony of the plaintiff is clear and explicit, while the behavior of the defendants manifests that they did not regard the obli-

gation of the plaintiff other than as he alleged it to be. The findings of the district court will therefore not be disturbed.

Other errors are assigned, but they are not noticed in the briefs. We therefore do not notice them.

The record shows that the contract was fair and just, and equal in all its parts; that, though the proceedings of the court were somewhat irregular, the cause was tried upon the merits; that the findings of the court are full upon all the issues involved; and that the evidence fully sustains the findings. The judgment and order are therefore affirmed.

Affirmed.

IN RE WEED.

(No. 1,744.)

(Submitted May 26, 1904. Decided June 3, 1904.)

Attorneys—Disbarment—Reinstatement.

Where an attorney was suspended for a specified time, with a provision that he might at the expiration of that time be restored to the privileges of an attorney, on proper petition, supported by satisfactory evidence of good conduct meantime, and at the expiration of that time he petitioned for reinstatement, filing a certificate, signed by nearly every member of the bar of the city where he resided, to the effect that he had conducted himself as, and was, a man of good moral character, he will be reinstated.

PETITION by Elbert D. Weed for reinstatement as a member of the bar. Petitioner reinstated.

Mr. Henry C. Smith, for Petitioner.

MR JUSTICE MILBURN delivered the opinion of the court.

This matter is before us upon the petition of Elbert D. Weed for his reinstatement as a member of the bar of this court; he having been suspended for two years by the court's order made and entered May 26, 1902, at the expiration of which time, it

was provided, he might be restored to the privileges of an attorney and counselor upon proper petition, supported by satisfactory evidence of good conduct meantime. (26 Mont. 241, 67 Pac. 308.) At the expiration of one year of the time fixed in the order, Mr. Weed, by formal request, supported by petitions signed by many members of the bar and by numerous others, prayed that he be reinstated at that time. This request was denied. (28 Mont. 264, 72 Pac. 653.)

The present petition is accompanied by a certificate in writing, signed by nearly every member of the bar of the city of Helena, where the applicant has resided for many years; the signers being sixty-one in number. They include among them four ex-justices of this court, as well as the two district judges residing in Helena. All of the gentlemen referred to as signing the certificate, which was filed with the petition herein, certify "that during all of the time since the 26th day of May, 1902, the said Elbert D. Weed has conducted himself as, and is now, a man of good moral character." The petition of the applicant, unlike the one presented a year ago, refers to the true reason why he was suspended, for that it refers specially to the files and records in the case.

Considering now the proper attitude of the petitioner, and the fact that his conduct since the date of his suspension, as appears from the certificate of the gentlemen referred to, has been such as to cause us to conclude that his conduct hereafter will be such as it should be as an attorney and counselor of this court, it is ordered that Elbert D. Weed be restored to the privileges of an attorney and counselor of this court upon his taking the usual oath of office.

CLARK, RESPONDENT, v. GREAT NORTHERN RAILWAY
COMPANY, APPELLANT.

(No. 2,027.)

(Submitted May 24, 1904. Decided June 3, 1904.)

Justices of the Peace—Defaults—Right to Enter—Interposition of Answer—Appeal—Trial in the District Court—Issues Presented.

1. Where defendant in a justice's court filed an answer which put in issue the allegations of the complaint, the justice could not enter judgment by default on failure of defendant to appear at the time set for trial.
2. Where the record of an action before a justice showed that he tried the issues, and entered judgment on the proof adduced by plaintiff, the judgment was not one by default, although the justice's docket recited the notice and entry of defendant's default.
3. Constitution, Article VIII, Section 23, provides for appeals from justices' courts to the district courts under regulations prescribed by law. Section 11 provides that the district court shall have appellate jurisdiction in such cases arising in justices' courts as may be prescribed by law. Code of Civil Procedure, Section 1760, provides the manner of taking an appeal from the justice's court, and Section 1761 provides that on such an appeal the cause must be tried anew in the district court. *Held*, that only such questions as were raised and presented in the justice's court can be tried on appeal in the district court, and where there was no showing that a motion was made in the justice's court to set aside the judgment and dismiss the cause, but the record showed that the case was tried on issues of fact raised by the answer, it was proper for the district court, on appeal from a judgment for plaintiff, to overrule a motion to dismiss the cause, and to try the issues of fact which had been raised before the justice.
4. The district court, sitting as an appellate court, is one of limited jurisdiction, and may only proceed in the manner and to the extent provided by law.

Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

ACTION by G. Gordon Clark against the Great Northern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Mr. E. L. Bishop, for Appellant.

It appears from the justice's docket that on December 12th, the date fixed for the trial, this case was adjourned indefinitely

and without date "at the plaintiff's request owing to the defendant's absence," and nothing further done until December 18th.

Section 1590, Code of Civil Procedure, provides that: "Unless postponed as provided in this chapter (Secs. 1591-1593), or unless transferred to another court, the trial of the action must commence at the expiration of one hour from the time specified in the notice mentioned in Section 1511, and the trial must proceed and there must be no adjournment for more than twenty-four hours at any one time until all the issues therein are disposed of." The absence of the defendant is not one of the causes for which a justice is authorized by statute to postpone the case. "The justice could only do what the statute says he may do. He has no implied power or jurisdiction. He must follow the statutory direction or permission." (*State ex rel. Kenyon v. Laurandean*, 21 Mont. p. 220.) The result of his failure to comply with the statutory mandate was a discontinuance of the suit and a total loss of jurisdiction for all purposes, rendering the judgment void. (*State ex rel. Kenyon v. Laurandean*, *supra*; 4 Am. & Eng. Ency. Pl. & Pr. pp. 893, 894, 896; *Sullen v. George* (Mich.), 31 N. W. 481; *Iowa U. Tel. Co. v. Boylan* (Iowa), 52 N. W. 1122; *McKenna v. State* (N. J.), 53 Atl. 695; *School Dist. v. Thompson*, 5 Minn. 280, and cases cited.)

Section 1660, Code of Civil Procedure, requires a justice to enter in his docket "every adjournment, stating on whose application and to what time." When the justice, on December 12th, adjourned this case without fixing and entering in his docket any definite time to which it was adjourned he lost jurisdiction to further proceed therein, and the case was discontinued and out of court. (*Brown v. Kellogg*, 17 Wis. 490, 491; *Brahmstead v. Ward*, 44 Wis. 591, approved in *Brosdle v. Sanderson*, 57 N. W. 49; *Waldron v. Palmer* (Mich.), 62 N. W. 731; *Murray Bros. v. Churchill & Co.*, 86 Ill. App. 480; *Lynsky v. Pendegrast*, 2 E. D. Smith, 43; *Woodworth v. Wolverton*, 24 N. J. Law, 419; *Linninger v. Glenn*, 49 N. W. 1128.)

In the district court plaintiff contended that defendant's appeal constituted a general appearance by which it waived the question of jurisdiction and submitted itself to the jurisdiction of that court, relying upon *Gage v. Maryatt*, 9 Mont. 265, decided under the provisions of the Compiled Laws, to sustain such contention. An appeal under Section 826, Code of Civil Procedure, Compiled Laws, removed the case into the district court for retrial upon its merits, as if commenced there, there being, as stated by this court in *Missoula E. L. Co. v. Morgan*, 13 Mont. p. 396, "no provisions for the district court on such appeal to review certain rulings of the justice of the peace in the course of his adjudication and decision of the case and on the correctness or incorrectness thereof determine the case in the district court." And in *Gage v. Maryatt*, *supra*, this court held, in accordance with the general rule, that a party after invoking the jurisdiction of the district court to try a case anew on the merits, could not object to or deny such jurisdiction, and that no appeal would lie from a default judgment. By the adoption of Section 1761 of the present Code of Civil Procedure a radical change was effected in the very respects which controlled the decision of the court in the last two mentioned cases, providing not only for an appeal on questions of law in all cases, but for a review and rendition of judgment on questions of law in any case where justified by the law and the facts. (*State ex rel. Shanahan v. Lindsay*, 22 Mont. p. 400, *et seq.*) Such an enlargement of the remedy by appeal has been uniformly held to amount to a substitution of such remedy for that by *certiorari*, even where the latter remedy was not expressly taken away by statute. (*Craighead v. Martin*, 25 Minn. p. 46; *Williams v. Bigelow*, 11 How. Pr. 83; *Sperry v. Reynolds*, 65 N. Y. 179; *Mattice v. Litcherding*, 14 Minn. 142; *Rahilly v. Lane*, 15 Minn. 447.)

In Montana the same legislature which gave this enlarged remedy by appeal took away, by Section 1941, Code of Civil Procedure, the remedy by *certiorari* in all cases where an appeal was given, even though the latter remedy was an inadequate

one. (*State v. District Court*, 24 Mont. p. 494; *State ex rel. Reynolds v. Laurandean*, 27 Mont. p. 522.) This would seem to show conclusively that the intent of the legislature was to substitute the remedy by appeal for that of *certiorari*. Any other construction would deprive litigants of the right to have the action of justices of the peace in excess of jurisdiction reviewed, which right of review, either by appeal or *certiorari*, exists almost universally elsewhere, and had theretofore existed in Montana by *certiorari*. (*State v. Evans*, 13 Mont. 245.) For while the jurisdiction of a justice to render judgment was reviewed by this court on *certiorari* in *State ex rel. Kenyon v. Laurandean*, *supra*, this case was expressly overruled on this point in *State v. District Court*, 24 Mont. 500.

The justice's court having no jurisdiction to try the case and render judgment, it is evident that the district court did not acquire such jurisdiction unless the appeal, on question of law alone, was such a general appearance as to confer the same; but an appeal on questions of law for the purpose of testing the jurisdiction of the court does not have that effect. (*Miner v. Francis*, 3 N. Dak. 549; *Craighead v. Martin*, 25 Minn. 44, 45; *Shaw v. Moser*, 3 Mich. 71.)

The question of jurisdiction arises in every case, for it is one which presents itself at the threshold and is passed upon by the court in every case by the very act of assuming jurisdiction to act therein. (*Chadwick v. Chadwick*, 6 Mont. 576; *Craighead v. Martin*, 25 Minn. 46.) And inasmuch as the justice's court had lost all jurisdiction of this action, the language of this court in *State ex rel. Shanahan v. Lindsay*, *supra*, "If the case involves a matter over which the justice's court has no jurisdiction, upon appeal it is the duty of the district court to set aside the judgment appealed from and enter a judgment of dismissal," is applicable to this case, and defendant's motion to dismiss should have been granted.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was commenced in a justice of the peace court for Silver Bow county by the respondent, who was plaintiff below, to recover for work and labor alleged to have been performed for the defendant railway company. On December 2, 1902, the defendant appeared in the justice court and filed its answer, putting in issue the allegations of the complaint. On December 5th the justice of the peace fixed December 12, 1902, at 2 o'clock p. m., as the time for the trial of the cause, and gave due notice as required by Section 1511 of the Code of Civil Procedure. On December 12th, at the time fixed for the trial, the plaintiff appeared, but the defendant was absent; and at plaintiff's request the justice of the peace continued the cause, but fixed no day to which the adjournment was taken. On December 18th the justice fixed December 22d at 2 o'clock p. m. for the trial of the cause, and gave due notice thereof. On December 22d the plaintiff appeared for trial, but the defendant did not appear. The justice's transcript then contains this recital: "Plff. present with his atty. and deft. not present by attorney or otherwise and not for one hour after the time Decr. 22, 1902, p. m. set for trial. The default of the deft. is on motion of atty. for plff. noted and entered." The court, having heard the evidence on behalf of the plaintiff, entered judgment for \$42 and costs. On December 26th the defendant gave notice of appeal to the district court, as follows:

"NOTICE OF APPEAL.

"You will please take notice that the defendant in the above-entitled action hereby appeals to the district court of the Second judicial district, in and for the county of Silver Bow, from the judgment therein made and entered in the said justice court on the 22d day of December, 1902, in favor of said plaintiff and against said defendant, and from the whole thereof. This appeal is taken on questions of law.

"Yours, etc.

"E. L. BISHOP, Attorney for Defendant and Appellant."

In the district court the railway company moved to dismiss the case on the ground that the justice court had lost jurisdiction by its indefinite postponement on December 12th. This motion was overruled, and the defendant declined to appear further in the action. A trial by jury having been previously waived, the court then heard testimony on behalf of the plaintiff, and rendered judgment in his behalf, from which judgment this appeal is prosecuted.

The appellant urges here that the justice of the peace court lost jurisdiction of the cause when it adjourned on December 12, 1902, for an indefinite period—that is, adjourned without specifying or fixing any definite time to which the adjournment was taken, as required by Section 1660 of the Code of Civil Procedure—and that it could not thereafter render or enter any valid judgment against this appellant, and, as the justice court did not have jurisdiction to render a valid judgment, the district court on appeal did not acquire jurisdiction for any purpose except to dismiss the cause altogether.

Assuming for the purposes of this appeal that appellant's contention is correct—that the justice court lost jurisdiction of the cause by its adjournment for an indefinite time—our inquiry here is as to the action of the district court in its treatment of the cause after it had been removed into that court by the appeal from the judgment rendered in the justice of the peace court.

We preface our consideration of the cause by saying, that the justice of the peace could not enter the default of the railway company on December 22d, notwithstanding the justice's docket entry seems to indicate that such was attempted. The defendant had on file an answer which put in issue the allegations of the complaint, and, notwithstanding the entry made by the justice of the peace at the time of the trial, the record does show that the justice tried the issues and entered judgment on the proof adduced by the plaintiff, so that the judgment was in no sense a judgment by default, and could not have been. (*Covart v.*

Haskins, 39 Kan. 574, 18 Pac. 522; 9 Ency. Law, 2d Ed., 168, and cases cited; 6 Ency. Pleading & Practice, 60.)

The notice of appeal filed in the justice of the peace court seeks to limit the inquiry in the district court to questions of law only, and in the district court the appellant sought to raise a question of law by its motion to dismiss the case on the ground that the justice of the peace had no jurisdiction to enter the judgment appealed from. This motion was overruled, and this action of the court is the error assigned here.

Section 23, Article VIII, of the Constitution, provides for appeals "from justice's courts, in all cases, to the district courts, in such manner and under such regulations as may be prescribed by law." Section 1760 of the Code of Civil Procedure provides the manner of taking an appeal, and Section 1761 of the same Code provides for the manner and extent of the review which may be had in the district court on such appeal. The district court, sitting as an appellate court, is one of limited jurisdiction, and may only proceed in the manner and to the extent provided by law. (Section 11, Article VIII, Constitution of Montana.) When a cause is transferred on appeal from a justice of the peace court to the district court, it must be tried anew in the district court. (Section 1761, above.) That language is susceptible of only one construction, namely, that only such questions as were raised and presented in the justice of the peace court can be tried in the district court. A question cannot be tried anew which has never been tried or presented for trial, but any question of law or fact which was properly raised and presented in the justice of the peace court can be tried anew in the district court, if properly presented there. Section 1761, above, received careful consideration in *State ex rel. Shanahan v. Lindsay*, 22 Mont. 398, 56 Pac. 827, and the construction there given it is conclusive of this appeal. Speaking of that section, the court, among other things, said: "An examination of its provisions shows that the intention of the legislature was that the procedure governing appeals should secure to the appellant a review in the district court of all the questions in the

case which he has properly raised or reserved in the inferior court. All cases appealed must be tried anew, just as they were tried, or should have been tried, in the lower court. If an answer be filed, and a trial of fact had, then, on appeal, there must be a trial on the facts, upon the pleadings filed in the lower court, unless the parties are, upon cause shown, and upon just terms, permitted to file others, or the court orders others to be filed. If a demurrer be filed in the lower court, or a question of law be raised in any other proper way, this may be taken advantage of in the district court."

What issues were raised in the justice of the peace court which could be tried anew in the district court in this instance? The record shows that the only issues were issues of fact raised by the answer. There is no showing that any motion was ever made in the justice of the peace court to set aside the judgment and dismiss the cause. On the contrary, it appears that this motion was first interposed in the district court, and, as that court had before it the record on appeal, showing that the only questions presented in the justice of the peace court were questions of fact, the district court properly overruled the motion to dismiss the cause, and tried the issues of fact which had been raised in the court below.

What is said herein must be limited to the facts presented in this case. The extent of the review which may be had on appeal from a judgment by default or in any appeal where additional pleadings are filed is not considered.

The judgment is affirmed.

Affirmed.

MR. JUSTICE MILBURN, not having heard the argument, takes no part in the foregoing decision.

MURRAY ET AL., APPELLANTS, v. HINDS ET AL.,
RESPONDENTS.

(No. 1,894.)

(Submitted April 29, 1904. Decided June 3, 1904.)

*Taxation—Surface of Mining Claims—Use for Purpose Other
Than Mining—Evidence.*

Constitution, Article XII, Section 3, and Political Code, Section 3672, declare that all mines and mining claims, after purchase from the government, shall be taxed at the price paid the government, and that if the surface ground, or any portion thereof, is valuable for any other purpose than mining, it shall be taxed at its value for such other purpose. A mining claim was within the limits of a city, and, while it had never been made an addition to the city, the owners had made a plat, and sold lots and blocks from the claim for townsite purposes; describing the portions sold by metes and bounds. The owners of the claim claimed that a portion thereof was reserved for mining purposes, and not taxable for any purpose other than mining; and it appeared that a shaft had once been sunk on such reserve, but that it had been abandoned, and that the lot on which the shaft was sunk had been sold. *Held*, that the so-called reserve was taxable for purposes other than mining.

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

Suit by James A. Murray and others against Thomas R. Hinds, as treasurer of Silver Bow county, and others. From a judgment for defendants, and from an order denying a motion for a new trial, plaintiffs appeal. Affirmed.

Mr. James E. Murray, for Appellants.

In this case the plaintiffs, as owners of the Railroad lode claim, seek to enjoin the enforcement or collection of certain assessments and taxes levied upon the portion of the claim reserved for mining purposes for taxation during the years mentioned in the complaint. It is an established fact in the case that the lode claim taxes during each and all the years in controversy were paid and the taxes which the defendants are seek-

ing to enforce against the reserved portions were levied for municipal and county purposes and levied upon the basis of the property being held and used for other than mining purposes. We submit that the record fails to show that the plaintiffs ever platted or caused the property in controversy to be platted, or ever held or used the property for other than mining purposes; that, therefore, it is only taxable for lode claim purposes, and the attempted levy of taxes, which are complained of in this case, was illegal and void and their enforcement or collection should be restrained. (*Farlin v. Hill* (Mont.), 69 Pac. 237; *Mayor, etc. v. Fear*, 82 Md. 256; Constitution of Montana, Art. XII, Sec. 3; Laws of 1891, pp. 73, 74; Political Code, Sec. 3672; *Montana C. & C. Co. v. Livingston*, 21 Mont. 59, 67; *Hopkins v. City of Butte*, 16 Mont. 103; 2 Devlin on Deeds, Secs. 1349, 1351; Black on Tax Titles, Secs. 463, 216, 217, 220, 386, 123, 124; *O'Hara v. Parker* (Ore.), 39 Pac. 1004, 1007; *Kitcherside v. Myers*, 10 Ore., 23; *Creely v. Brick Co.*, 103 Mass. 515; Political Code, Secs. 4024, 4026, 5165, 3897, 3898; *Cobban v. Hinds*, 23 Mont. 338, 349, 350; *Brown v. French*, 80 Fed. 166-170; Cooley on Taxation, pp. 469, 470; 1 High on Injunction, Sec. 530, 413 note 1, 697; *Bucknall v. Story*, 36 Cal. 67, 74; Code of Civil Procedure, Sec. 871; *Hare v. Carnal*, 39 Ark. 196; *Dows v. Chicago*, 11 Wall. 108; *Kellogg v. King*, 114 Cal. 378; *Gregg v. Sanford*, 65 Fed. 151-8; *Robinson v. City of Wilmington*, 65 Fed. 856-8; *Ogden v. Armstrong*, 168 U. S. 223.)

The plaintiffs also complain that even though the alleged and pretended taxes were properly assessable against the property in controversy, that there never was a valid levy of the same, and they are not binding. Under the provisions of the law existing prior to the Codes of 1895, the board of county commissioners of each county constituted the board of equalization. (Comp. Stat. 1887, Div. 5, Sec. 1698; Laws 15th Sess., p. 92, Sec. 22; Laws 2d Sess., p. 96.) Under the provisions of Section 378, Chapter 22, Fifth Division, Compiled Statutes of 1887, as amended by the Act of March 14, 1889, "the city coun-

cil or board of aldermen of each incorporated city or town shall, prior to the 1st day of September, elect four of their number, and the aldermen so elected, together with the county commissioners, shall constitute a board of equalization, whose duty it shall be to equalize the assessments of property within the limits of the city or town as they may deem just and equitable." (Laws of 1889, p. 184.) The attention of the court is called to the fact that no such board of equalization was ever constituted, in that the record shows that the only members of the council that ever met with the county commissioners as a board of equalization to pass upon the taxes for the years 1893 and 1894 were three members of the council appointed by the mayor. We therefore submit that no board of equalization was ever constituted, before whom the plaintiffs would have a right to appear and complain concerning the taxes in controversy for the years mentioned. A valid tax must rest upon an assessment made as required by law. (*Houghton v. Austin*, 47 Cal. 663; *Cooley on Taxation*, pp. 257, 258; *Black on Tax Titles*, Secs. 123, 124.)

Messrs. Kirk & Clinton, and Mr. Peter Breen, for Respondents.

MR. COMMISSIONER CALLAWAY prepared the following opinion for the court:

Appellants, James A. Murray, the Montana Loan & Realty Company, and the Home Investment & Realty Company, as owners of the Railroad lode claim, seek to enjoin the collection of certain taxes levied upon a portion of the claim which they allege to be reserved for mining purposes. During the years in controversy appellants paid the taxes due upon the mining claim as such. The taxes which are objected to were levied for county and municipal purposes upon the basis that the surface of the claim has an independent value, and is used for other than mining purposes. At the close of appellants' case, respondents moved for a nonsuit, which was granted. Appellants moved

for a new trial, which was denied, whereupon they appealed from the judgment and the order denying their motion for a new trial.

Section 3, Article XII, of the Constitution, declares, in part: "All mines and mining claims, both placer and rock in place, containing or bearing gold, silver, copper, lead, coal or other valuable mineral deposits, after purchase thereof from the United States, shall be taxed at the price paid the United States therefor, unless the surface ground, or some part thereof, of such mine or claim, is used for other than mining purposes and has a separate and independent value for such other purposes, in which case said surface ground, or any part thereof, so used for other than mining purposes, shall be taxed at its value for such other purposes, as provided by law."

Section 3672 of the Political Code follows the language of the above section of the Constitution, and provides that "said surface ground, or any part thereof, so used for other than mining purposes shall be taxed at its full value for such other purposes."

The proposition submitted, then, is simple: If the surface ground of the Railroad lode which is in controversy in this action, at the time the tax was levied, was used for other than mining purposes, and had a separate and independent value for such other purposes, the tax, if regularly levied, should be sustained. That the surface of the Railroad lode at the time in question had a separate and independent value for townsite purposes is, upon the records, indubitable. Was it used for townsite purposes? It appears to be within the corporate limits of the city of Butte. If its owners had laid out the surface of the Railroad lode into blocks, lots, streets and alleys, filed a plat thereof with the county clerk, and, by compliance with the law provided in such cases, made the surface of the Railroad lode claim an addition to the city of Butte, and sold the lots for townsite purposes, there could be no question but what the vendors made use of the lots so sold for townsite purposes.

Appellants introduced in evidence a plat marked "South Side Addition," which shows the surface of the Railroad claim to have been divided into blocks, lots, streets and alleys. Parts of the streets and alleys appear to have been condemned as such by the city of Butte. The blocks, lots and streets on the Railroad claim conform to the streets and alleys of Butte as they existed at the time of the trial. The part claimed as reserved for mining purposes is divided into blocks and lots.

The witness Cobban testified: "As to whether or not that claim, or any part of it, was ever platted by either of the owners of the claim, or any one representing it, is a kind of a hard question to answer. The claim was platted for private use, and it was afterward used for private plat. There never was a plat filed of that claim, and no record was ever made of the plat. The lots on Wyoming street originally were, I think, 60 feet in width and 110 feet long. This was in the reserved portion, that I have referred to." Further on he said: "The property described in the complaint as being that which Mr. Hinds, as treasurer of Silver Bow county, has advertised for sale and threatens to sell, I suppose, has reference to the South Side Addition, or the Railroad lode."

The record discloses affirmatively that the greater portion of the surface of the Railroad claim has been sold for townsite purposes, and is built up as a part of the city of Butte. The lots were not sold and conveyed by number of the lot and block, but by metes and bounds, conforming to the lots and blocks as platted. Appellant Murray so conveyed considerable portions of it. The Thompson Investment Company, a real estate agency, and Messrs. Cobban & Casey, real estate agents, at different times, had charge of the property for the purpose of disposing of it. Mr. Casey testified: "There was a mineral reserve made on that lode claim, the western boundary of which was Wyoming street, and this so-called Indiana avenue. That avenue was not in existence at that time, but I know that there was a solid block between that and Wyoming street, which was reserved for a shaft for mining purposes."

No mining appears to have been done upon the so-called reserve, except that in 1893 or 1894 a shaft about thirty feet deep was sunk on what is designated as lot 4 in block 3. This lot was afterwards sold. Indeed, the west half of the "solid block" referred to by Mr. Casey, as indicated by the map marked "Exhibit A," is covered with buildings, as is lot 17 on the easterly half. The so-called reserve apparently consists of six lots and two fractional lots on the easterly side, and approximately three and a half lots on the southerly side, of block 3. At any rate, all the other lots appear to have been built upon, and so clearly used for townsite purposes. Now as to the reserve as last defined: The witness Corbett, a real estate agent, testified that while he was with the Thompson Investment Company that concern was instructed not to sell a portion of the property which corresponds to block 3, but said "it was later on segregated and sold." No explanation of this statement was made.

It thus appears that the owners of the Railroad lode accomplished every purpose which they could have brought about had they formally made the Railroad claim an addition to the city of Butte. They divided it into blocks and lots conforming to the streets and alleys of Butte, and sold the same as favorable opportunity offered. If they once did reserve a portion of the premises, with the intention of using the same for mining purposes, that intention, as shown by their acts, was abandoned. The property was platted and either sold or held for sale for townsite purposes. When the surface of the Railroad claim became of an independent value for townsite purposes, and was used as such, it became subject to taxation under the Constitution and statutes.

Appellants have failed to prove that the tax complained of does not lawfully attach to the property in controversy, and upon that issue the holding of the lower court was correct. Merely claiming a portion of the premises as reserved for mining purposes, and at the same time disclosing a state of facts absolutely inconsistent with the basis of their contention, places

them in the position of having adopted a subterfuge to escape paying taxes on the property.

2. Appellants seek to avoid the tax levies because, as they say, the boards of equalization were not properly constituted. Under the pleadings and proof, this feature of the case is immaterial. Appellants do not complain that the taxes were in any wise excessive, their only claim being that the tax is wholly invalid. Having held that the property was subject to taxation, it is unnecessary to consider this point further.

It follows that the judgment and order should be affirmed.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

MR. CHIEF JUSTICE BRANTLY, not having heard the argument, takes no part in this decision.

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32	218
32	578

STATE RESPONDENT, v. LAGONI ET AL., APPELLANTS.

(No. 1,888.)

(Submitted April 26, 1904. Decided June 3, 1904.)

Criminal Law—Justice of the Peace—Bail—Action on Bail Bond—Pleading—Evidence.

1. A justice's court is of inferior jurisdiction, and no presumptions are to be indulged in favor of the regularity of its proceedings.
2. Though a defendant is released on bail, if the bond was not lawfully required, it is *nudum pactum*.
3. Constitution, Article VIII, Section 20, gives a justice court jurisdiction as an examining court in cases of felony, and Code of Civil Procedure, Section 745, declares that in pleading a judgment or other determination of a court, officer or board, it is not necessary to state the facts conferring jurisdiction, but the determination or judgment may be stated to have been "duly given or made." In an action on a bail bond the complaint alleged that a certain person was ordered by a certain justice of the peace to be held to answer on a charge of burglary, on which he was admitted to bail; the justice then and there having full authority and power to accept and approve the bond; and that he duly approved it, and ordered the release of

- defendant. *Held*, that the complaint was insufficient for failing to allege the jurisdictional facts that the defendant was charged by a complaint filed with the justice, and examined upon the charge, etc., or to state the judicial capacity of the justice, and that the order holding defendant to answer was "duly given" or "duly made" or "duly given and made."
4. The fact that a magistrate accepting a bail bond failed to comply with the statute requiring it to be filed in the district court was no defense to the sureties in an action on the bond.
 5. A complaint in an action on a bail bond is fatally defective where it fails to state that the amount due by the terms of the bond has not been paid.
 6. Though a committing magistrate has made his return to the clerk of the district court, he still has power and authority to accept and approve the bail undertaking required by his order until the district court obtains final jurisdiction on the filing of an information, or the presentation of an indictment, or until a district judge or justice of the supreme court has fixed a new defendant's bail.
 7. Where, in an action on a bail bond, it was shown that an information was filed against the defendant, charging him with a crime, and that he failed to appear and answer, and that the court thereupon ordered the bond forfeited, a contention that the state did not prove that an order of forfeiture was made was without merit.
 8. Where the county attorney fails to comply with Penal Code, Section 1730, any advantage thereof must be taken by defendant by motion to set aside the information, which must be done before demurrer or plea, and failure to so take advantage of the irregularity waives it. The negligence of the county attorney in this respect cannot be taken advantage of by the sureties on defendant's bail bond.
 9. The fact that a magistrate made a verbal order of release, instead of complying with Penal Code, Section 2354, was no defense to a surety in an action on the bail bond.
 10. Insanity cannot be proved by reputation.
 11. In an action on a bail bond defendant sureties pleaded that the principal in the bond, who had disappeared, was dead, when the bond was declared forfeited, and a witness testified for defendants that he knew of the principal having attempted to commit suicide on two different occasions. *Held*, that the testimony was properly stricken as immaterial.
 12. In an action on a bail bond it appeared that the principal was charged with a felony about the middle of June, and that the case came on for trial in the following November, and defendant sureties offered to prove, in order to establish the death of their principal, that he was an old man; that on two or three occasions he had attempted suicide; that he lived in a place the surroundings of which were such that a body might lie for weeks, months and even years without discovery; that he had never been seen or heard of since about a week before the forfeiture of the bond, and that no trace had ever been found of him. *Held*, that the offer was properly denied.

Appeal from District Court, Flathead County; D. F. Smith, Judge.

ACTION by the state of Montana against N. P. Lagoni and W. F. Stufft. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendants appeal. Reversed.

Mr. M. D. Baldwin, and Mr. Sidney M. Logan, for Appellants.

Mr. James Donovan, Attorney General, for the State.

MR. COMMISSIONER CALLAWAY prepared the following opinion for the court:

The defendants have appealed from a judgment against them and from an order denying their motion for a new trial.

1. They assert that the complaint filed against them does not state facts sufficient to constitute a cause of action. That pleading states that on the 1st day of May, 1901, the defendants covenanted with the plaintiff under their hands and seals to pay the plaintiff the sum of \$1,000; "that said obligation was upon the express condition thereunder written that whereas, an order having been made on the 25th day of April, A. D. 1901, by A. McArthur, a justice of the peace of Kalispell township, Flathead county, Montana, that James E. Finch be held to answer to the district court of the Eleventh judicial district in and for Flathead county, Montana, on a charge of burglary, upon which he was admitted to bail in the sum of one thousand dollars, and thereupon said defendants tendered said bond to said A. McArthur, a justice of the peace as aforesaid, and said justice, then and there having full power and authority to accept and approve said bond, duly approved the said bond, and in consideration of the execution and delivery and giving of said bond ordered the release of said defendant mentioned therein, to-wit, James E. Finch, and thereupon and in consideration thereof, said Finch was released and discharged from custody;" that according to the terms of the bond defendants covenanted that Finch would appear at all times required in said court (probably meaning the district court), but that Finch failed to appear and answer to an information filed against him in the district court.

A copy of the undertaking, which substantially complies with the requirements of Section 2351 of the Penal Code, is attached to the complaint, marked "Exhibit A." No objection is made to the form or sufficiency of the undertaking.

It is apparent that there is a want of substance in this complaint. A justice's court is of inferior jurisdiction, and no presumptions are to be indulged in favor of the regularity of its proceedings. (*Layton v. Trapp*, 20 Mont. 453, 52 Pac. 208; *State ex rel. Kenyon v. Laurandeau*, 21 Mont. 216, 53 Pac. 536.) The Constitution provides that a justice's court shall have jurisdiction as an examining court in cases of felony (Article VIII, Sec. 21), and the statute provides the method of procedure; but that jurisdiction must, of course, be properly invoked. Was the jurisdiction of the justice's court properly invoked against Finch? If it was not, then the bail bond is *nudum pactum*. (*Deer Lodge County v. At*, 3 Mont. 168.) Before the justice could have made a valid order holding Finch to answer, he must have been charged, by complaint on oath filed with the justice, of having committed a public offense in the county of Flathead. He must have been brought before the justice on such charge, and have been examined upon it, unless he waived examination. If, upon examination, it appeared that a public offense cognizable by the district court had been committed in the county of Flathead, and there was sufficient cause to believe Finch guilty thereof, it was the duty of the justice to hold him to answer, and, if Finch waived examination, the duty of the justice was the same. Thereupon, the offense being bailable, it was the duty of the justice to admit Finch to bail, fixing the amount thereof.

In *Territory v. Hildebrand*, 2 Mont. 426, the court said: "While under our statute the jurisdiction of the court taking the recognizance need not be recited therein, nor the proceedings and orders requiring a party to enter into a recognizance for his appearance at court, these facts should appear in a complaint which seeks to recover judgment on such a recognizance." The recognizance required of a defendant under the statute in force when the *Hildebrand Case* was decided is practically the same as that required of Finch in this case. The word "recognizance," as then used, is practically synonymous with the word "undertaking," as now employed. The doctrine of the *Hilde-*

brand Case was followed in *Deer Lodge County v. At, supra*, and, while the authorities on this subject are not uniform, we shall not now depart from the rule heretofore established by this court. But a statutory method of pleading the jurisdictional facts is prescribed by Section 745 of the Code of Civil Procedure, which reads as follows: "In pleading a judgment, or other determination of a court, officer or board, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading must establish on the trial the facts conferring jurisdiction." When the *Hildebrand* and *At Cases* were decided, Section 67 of the Civil Practice Act (Codified Statutes, 1871-72), which is nearly the same as Section 745, *supra*, was in force, but apparently the court's attention was not called to it. Section 67 was re-enacted as Section 101 of the Code of Civil Procedure in the Revised Statutes (1879). Sections 67, 101 and 745 apply to justices' courts. (*Weaver v. English*, 11 Mont. 84, 27 Pac. 396.) So that the complaint in this action should have stated the jurisdictional facts "in ordinary and concise language," or should have stated the judicial capacity of the justice of the peace, and that the order holding Finch to answer was "duly given," "duly made," or "duly given and made." Of course, stating that an order was "duly given and made" is no more than the statement of a conclusion of law, but it is made sufficient by statute, and is for the purpose of obviating the necessity of pleading the jurisdictional facts as the common law requires.

The complaint before us does not show that the court had jurisdiction to make the order holding the defendant to answer, nor that the order was duly given and made. The allegation that the justice had full power and authority to accept the bond does not in any wise cure the defect. The complaint is simply a mass of recitals. It states "that whereas an order having been made," and so forth. This is far too short of the statutory requirement. It does not even state that the order was "duly"

made. "The word '*duly*' is most essential. It can hardly be dispensed with and satisfy the terms of the statute. I can imagine no single word that will supply its place. * * * The statute gives a short and simple form of pleading a judgment; and it is safest, if not indispensable, that the statute language be adopted and used when the party seeks to avail himself of this provision of the Code, instead of following the common-law forms in such cases." (*Hunt v. Dutcher*, 13 How. Prac. 538.) This case was followed in *Harmon v. Comstock Horse & Cattle Company*, 9 Mont. 243, 23 Pac. 470, in which this court also quotes from *Young v. Wright*, 52 Cal. 410, in part as follows: "A party wishing to avail himself of a provision of this character must comply strictly with its terms. In exonerating him from an obligation which would otherwise be incumbent upon him, the statute prescribes the precise conditions on which he is to be relieved; and they must be strictly performed." And see *Weaver v. English*, *supra*; *Knight v. Le Beau*, 19 Mont. 223, 47 Pac. 952; *Walter v. Mitchell*, 25 Mont. 385, 65 Pac. 5.

The reason for the rule that the jurisdictional facts must be pleaded, either directly or by the statutory method, is that neither the inferior court's jurisdiction nor the regularity of its proceedings is presumed, and, in order to prove the liability of the sureties upon the undertaking, it must be shown to be a valid one. Hence it is necessary to show that it was required of the accused by a court having jurisdiction of the offense proceeding under due form of law. While it is true that the consideration for the bond is the release of the accused from custody, yet, if the bond be not lawfully required of the accused, it is *nudum pactum*.

Defendants further say that the complaint is insufficient because it does not state that the undertaking was filed in the district court. This point is not well taken. If the magistrate had failed to comply with the statute in this regard, the sureties could not take advantage of it. (*State v. Wrote*, 19 Mont. 209, 47 Pac. 898.) However, we note that the complaint fails to

state that the district court declared the undertaking forfeited.

The complaint is also fatally defective because it fails to state that the amount due the plaintiff by the terms of the undertaking has not been paid.

2. The state was permitted to introduce in evidence, over defendants' objections, certain papers filed in the justice's court, as well as his docket entries; also the undertaking, and order of the district court declaring it forfeited. The action of the court in admitting this evidence defendants allege to be erroneous, because the complaint fails to state a cause of action, and it appears that the bond was accepted and approved by the justice of the peace five days after he had certified his proceedings in the case to the district court. The sufficiency of the complaint being disposed of, we will take up the second ground of objection. Defendants say the justice, when he undertook to do so, had no jurisdiction to accept and approve the undertaking.

Section 2350 of the Penal Code provides: "When the defendant has been held to answer upon an examination for a public offense, the admission to bail may be by the magistrate by whom he is so held, or by any magistrate who has power to issue the writ of *habeas corpus*."

Defendants say that the words "is so held" limit "the exercise of the power of admitting to bail to cases then pending before such justice, or in some manner retained within the jurisdiction of the justice taking the bail." The words "is so held" must be construed with the words "has been held." The latter are in the past tense. The bail where a defendant is held to answer may not be required until the order holding him to answer has been made. Then the magistrate who made the order, or one who has the power to issue the writ of *habeas corpus*, may admit the defendant to bail. No one else may do so. Thus no other justice of the peace than the one who made the order may step in and admit the prisoner to bail. But the magistrate who committed him can, and we regard this section as an extension of the committing magistrate's jurisdiction to that ex-

tent. The act of certifying up his proceedings to the district court is a mere ministerial one on part of the magistrate. The period elapsing after the magistrate has made his order committing the defendant and before he certifies his record to the district court is not one limiting the magistrate's power to accept and approve the undertaking. This section, which in terms allows the magistrate making the order to admit the defendant to bail, certainly means that the committing magistrate may approve and accept the undertaking which he has himself required by his order made upon holding the defendant to answer. Any other construction of this statute would, at times, infringe seriously upon a prisoner's right to be admitted to bail. All persons are bailable by sufficient sureties, except for capital offenses, when the proof is evident, or the presumption great, and excessive bail shall not be required. (Constitution, Art. III, Secs. 19, 20.)

If defendants are correct in their contention, a magistrate might make an order committing a defendant to jail until he should give bail in a certain amount, the magistrate might forthwith make his return to the clerk of the district court (Penal Code, Sec. 1693), and before the prisoner could procure the bail, and then the defendant could not be released from custody except upon the order of the district judge or a justice of the supreme court. In all of the judicial districts in the state except four, the district judge is at all times absent from some of his counties. The plight in which a prisoner might find himself in such case is apparent. No such hardship was intended by the statute in question. When the committing magistrate has made his returns to the clerk of the district court, we think he nevertheless still has power and authority to accept and approve the bail undertaking which is required by his order until the district court obtains final jurisdiction of the entire matter upon the filing of an information or the presentment of an indictment against the prisoner, or until a district judge or justice of the supreme court has fixed anew the prisoner's bail. The evidence objected to should have been excluded only upon the

ground that the complaint is insufficient. The authorities cited by defendants are inapplicable to our statute.

3. The defendants claim that the state did not prove that an order of forfeiture was made, but we do not agree with them. It was proved that an information was duly filed against Finch upon leave of court, charging him with the crime of burglary; that he failed to appear and answer the same; and, as appears from the court's minutes, the court thereupon ordered his bond forfeited. Section 2400 of the Penal Code provides in part: "If, without sufficient excuse, the defendant neglects to appear for arraignment or for trial or judgment, or upon any other occasion when his presence in court may be lawfully required, or to surrender himself in execution of the judgment, the court must direct the fact to be entered upon its minutes, and the undertaking of bail, or the money deposited instead of bail, as the case may be, is thereupon forfeited." This statute seems to have been sufficiently complied with.

4. The defendants attempted to interpose an affirmative defense alleging that more than thirty days elapsed after the delivery of the complaint, warrant and other papers filed in the justice's court to the clerk of the district court, and prior to the time the county attorney filed his information. On motion of the county attorney this so-called defense was stricken out. During the trial the defendants offered an instruction by which they sought to cover this feature of the case, but the court refused it.

Section 1730 of The Penal Code provides: "When the defendant has been examined and committed, or admitted to bail as provided in this code, or upon leave of court, the county attorney must, within thirty days after the delivery of the complaint, warrant and testimony to the proper district court, or after such leave, file in such court an information charging the defendant with the offense for which he is held to answer, or any other offense disclosed by the testimony. In case the county attorney fails to file the information within the time specified

he is guilty of contempt, and may be prosecuted for neglect of duty as in other cases."

It was held in *State v. Smith*, 12 Mont. 378, 30 Pac. 679, that the failure of the county attorney to comply with the statute in this regard must be taken advantage of by the defendant by motion to set aside the information, and this must be done prior to demurrer or plea. If not so taken advantage of, the irregularity is waived. When the county attorney, upon leave of court, filed an information against Finch, it was obligatory upon the latter to appear for arraignment under the terms of his undertaking, and he could then have taken advantage of the irregularity, or waived it, as he might have been advised. The negligence of the county attorney in this respect cannot aid the defendants.

5. Defendants asked the court to instruct the jury that if they found "that, although all the other requirements of the law were complied with, still if the magistrate did not make and sign an order for the release of James E. Finch, his release, if he was released, was unlawful, and the defendants cannot be held liable on the bond." It seems that the magistrate did not make a written order releasing Finch.

Section 2354 of the Penal Code provides: "Upon the allowance of bail and the execution of the undertaking, the magistrate must, if the defendant is in custody, make and sign an order for his discharge, upon the delivery of which to the proper officer, the defendant must be discharged."

This section contemplates that, when the bail is given, the prisoner shall be discharged. The two points aimed at are securing the bond and releasing the prisoner. The intermediate steps are merely directory. An oral order of release given by the magistrate to the officer who has charge of the prisoner is a sufficient compliance with the statute so far as the prisoner and his sureties are concerned, although it shows a neglect of the statutory formalities by the justice which is far from commendable. If anything more is necessary, the prisoner and sureties cannot take advantage of it. The Supreme Court of California

held substantially to this effect in construing Section 1281 of their Code, which is identical with our Section 2354. (*City and County of San Francisco v. Randall*, 54 Cal. 408. And see *Dilley v. State*, 3 Idaho 285, 29 Pac. 49.) It reasonably appears that the justice gave an oral order to the sheriff to release Finch, and it further appears without any doubt whatever that Finch was released solely because the undertaking in question was given, and the order made.

6. By way of defense the defendants pleaded that long prior to June 24, 1901, the day on which the bond was declared forfeited, Finch died. This the state denied. In support of this defense the defendants placed a witness upon the stand who testified that he had known Finch, who was about 60 years of age, for 18 or 20 years. Then this question was asked: "You may state what was his reputation in the neighborhood in which he lived, among his neighbors, as to his being sane or insane." This was objected to as incompetent, immaterial and irrelevant, and the objection was sustained.

The evidence solicited was clearly incompetent. It is not permissible to prove insanity by reputation. Even so, it does not appear what relevancy his sanity bore to the issue. It was not pleaded that Finch was insane, but that he was dead. It may be that counsel for defendants saw, or thought they saw, some connection between Finch's alleged insanity and his attempts at suicide, for the next question asked the witness was, "Do you know of Mr. Finch ever having attempted to commit suicide?" The answer was in the affirmative, the witness saying, "To the best of my recollection, it was in the summer of '84," and "a year or two later than that he attempted to take his life the second time." This testimony was stricken out, on motion of the county attorney, "as being too remote from the 24th day of June (1901), and as incompetent, irrelevant and immaterial." The court's ruling was correct. The evidence called for was, in any view, wholly immaterial.

Defendants then offered to prove "the following circumstances as tending to prove the death of James Finch: That

he was an old man; that on two or three occasions he attempted suicide, and would have committed suicide if he had not been prevented by the interposition of other persons; that he lives in a place, the surroundings of which are such that a body might lay [sic] for weeks, months and even years without discovery; and that he has never been seen nor heard of since about a week prior to the forfeiture of the bond, and that no trace has ever been found of him by the sheriff or any of his deputies, or any other person." The offer was denied, and correctly. Finch disappeared about the middle of June, 1901, and this case came on for trial on November 20th following. Approximately five months only had elapsed. Finch was charged with felony, and, if found guilty, would have been sentenced to a term in the state prison. The offered testimony did not even remotely tend to show that Finch was dead at the time he was required for arraignment. No such remote and unsupported circumstances as these can be allowed for the purpose of relieving the bondsmen of their burden. Any other rule would make the collection of forfeited bail bonds almost impossible. It is well to remember that seven years is fixed by statute as the time when one is presumed to be dead if he has not been heard from within that period. (Code of Civil Procedure, Sec. 3266, Subd. 26.)

7. We have carefully examined the instructions given, as well as those refused, and do not find any error of which defendants may complain.

We are of the opinion that the judgment and order should be reversed, and the cause remanded for a new trial.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause is remanded for a new trial.

MR. CHIEF JUSTICE BRANTLY, not having heard the argument, takes no part in this decision.

CASES DETERMINED
IN THE
SUPREME COURT
AT THE .
JUNE TERM, 1904.

THE HON. THEO. BRANTLY, Chief Justice.
THE HON. GEORGE R. MILBURN,
THE HON. WILLIAM L. HOLLOWAY, } Associate Justices.

COMMISSIONERS:
HON. JOHN B. CLAYBERG,
HON. LEW. L. CALLAWAY,
HON. W. H. POORMAN.

HEINZE ET AL., APPELLANTS, v. BOSTON & MONTANA
CONSOLIDATED COPPER & SILVER
MINING CO., RESPONDENT.

(No. 2,022.)

(Submitted May 23, 1904. Decided June 13, 1904.)

*Mines—Owner of Surface—Presumption of Ownership of Ores
Beneath the Surface—Evidence to Overcome—Sufficiency—
Preliminary Injunction—Discretion of Court:*

1. The presumption that an owner of the surface is also the owner of ores found beneath the surface is not overcome by the opinion of an engineer that, if a vein having its apex in ground owned by another continues to dip at the same angle as it dips where it is exposed in upper levels, it will reach the point where the owner of the surface is conducting operations.
2. The granting of an injunction *pendente lite* is within the discretion of the trial court, and, in the absence of a clear abuse of it, the supreme court will not interfere.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

SUIT by F. Augustus Heinze and another against the Boston & Montana Consolidated Copper & Silver Mining Company. From an order denying an application to modify an order directed by the supreme court to be made, plaintiffs appeal. Affirmed.

Mr. John J. McHatton, and Mr. James M. Denny, for Appellants.

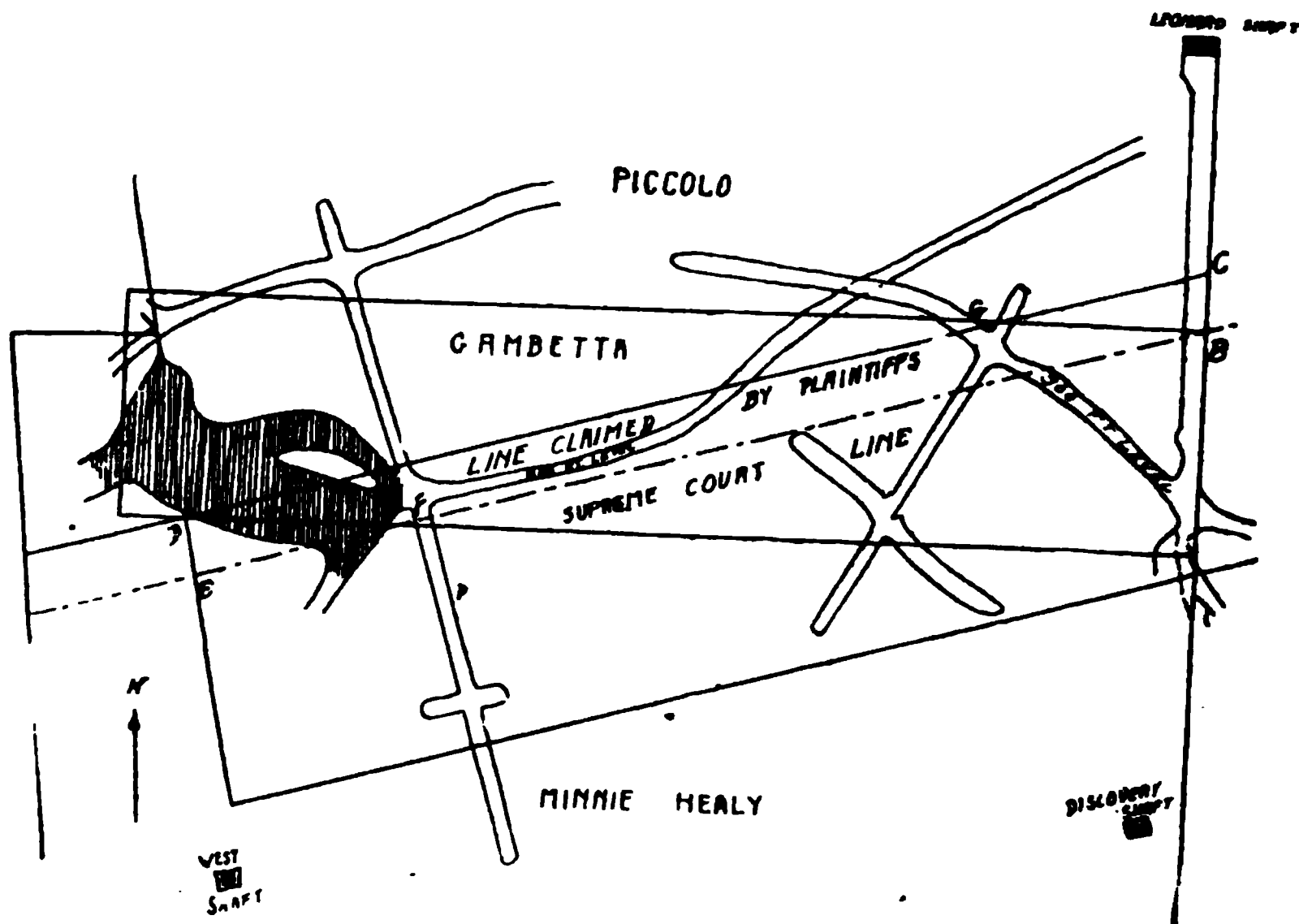
Mr. A. J. Shores, Messrs. Forbis & Evans, and Mr. C. F. Kelley, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This cause was heretofore before this court on appeal by the defendant from an order granting an injunction *pendente lite*. Upon consideration of the facts exhibited in the record, the order of the district court was modified. (26 Mont. 265, 67 Pac. 1134.) Afterward an application was made to the district court to extend the scope of the order so as to include ore bodies expressly excluded from its operation by the order of this court, it being alleged that subsequent developments made in the disputed territory demonstrated that these ore bodies belong to a vein having its apex in plaintiffs' ground. Charges were also made that the defendant, though enjoined from mining within plaintiffs' boundaries and removing ore therefrom, burnt powder and other material in its own workings adjacent

to the place where plaintiffs' operations are carried on, for the purpose of obstructing the plaintiffs by producing illness in their employes and rendering it dangerous for them to remain in the vicinity, and that the smoke so created entered into the workings of plaintiffs and produced the intended effect. The district court denied the application. The plaintiffs appealed.

The situation of the property involved, and the controversy with reference to it, is illustrated by the following diagram:



The legal title to an undivided six-eighths interest in the Minnie Healy lode claim is admitted to be in the plaintiffs. The claims to the north, the Piccolo and Gambetta, belong to the defendant. The contention of plaintiffs is that the apex of the discovery vein in the Minnie Healy is found near the east boundary of the claim, at the discovery shaft, and passes through the claim from the east to the west nearly parallel with the south boundary line of the Piccolo, and crosses the west end line of the claim immediately west of the west shaft; that it dips to the north at an angle of about 70 degrees; and that the defendant is trespassing upon the exterior portions of it beneath the surface of the Piccolo and Gambetta claims. The

particular portion of the workings involved here is indicated by the irregular shaded figure near the southwest corner of the Gambetta, and consists of large bodies of ore on the eighth and lower levels of the defendant's workings down to the twelfth. The defendant is engaged in stoping and removing this ore. The contention of the defendant is that these ore bodies are a portion of the Leonard vein, having its apex in the defendant's ground to the north. Upon the former hearing the same contention was made, and this court, upon the evidence adduced, concluded that it did not tend to show that the plaintiffs had any ground for their contention. Accordingly the district court was directed to modify its order so as to exclude these ore bodies from its operation. This it was directed to do by limiting the scope of the order to the workings south "of a plane descending vertically into the earth on a line parallel with the south side line of the Piccolo lode claim, and passing through the point at which the north side line of the Gambetta lode claim intersects the third or 300-foot level south of the Leonard shaft." The line of this plane is indicated by the letters E, B.

The workings where the nuisance is alleged to have been committed are in the Minnie Healy ground, and are connected with the plaintiffs' workings by a crosscut extending south from the point F. It is charged that a fire was built in this crosscut near the point F, and that the smoke created by it was carried by the natural draft through the crosscut south into plaintiffs' workings.

The evidence in the record fails to disclose any additional development by the plaintiffs, tending to connect these excluded ore bodies with the apex of the Minnie Healy vein.

Much mining has been done by the defendant on the various levels from the 800 down to the 1,200 since the order was modified, but none of this development tends to support the conclusion that the ore bodies in controversy belong to the Minnie Healy vein. Furthermore, the plaintiffs have not by their operations so developed their own workings from the apex of their vein down to the disputed territory as to furnish substan-

tial evidence that their claim is probably well founded. Indeed, while they concede that there is a vein in the defendant's ground dipping to the south, their own contention is based exclusively upon the opinion of their engineers that, if the vein having its apex in the Minnie Healy ground continues to dip at the same angle from certain points where it is exposed in the upper levels in their workings, it will reach the point where the defendant is conducting its operations. This is not sufficient to overcome the presumption that the defendant owns the ores found beneath its own surface. This presumption may not be overturned by speculative conjecture or even intelligent guess. In any event, we do not think that, upon the showing made, we are justified in saying that the district court abused its discretion in refusing to enlarge the scope of the order. A large discretion is lodged in that court in such matters, and, unless in a particular case it appears that there has been a clear abuse of it, this court will not interfere. (*Parrot S. & C. Co. v. Heinze*, 25 Mont. 139, 64 Pac. 326, 53 L. R. A. 491, 87 Am. St. Rep. 386, and cases cited.)

There is no substantial ground for controversy as to the meaning of the order made by this court upon the former appeal. It is said by counsel for plaintiffs that it is ambiguous, in that there are two points at which "the north side line of the Gamba lode claim intersects the third or 300-foot level, south of the Leonard shaft," and that, as this court evidently intended to so fix the position of the dividing plane as to preserve the property pending the litigation, a proper construction of the order would make the plane pass through the point G, instead of B. It is further said that, as a vertical plane passing through the point G cuts through the ore bodies, and leaves a portion of them to the north, to be mined out by the defendant, the injunction order should, in any event, be extended to prevent this result. After consideration of the facts then before the court, the order was made. The word "south" was used intentionally to indicate exactly the point through which the plane should pass. It is not ambiguous, but clear and explicit, as it was in-

tended to be, and evidently the district court did not misunderstand its import. The point named in the order is due south, while the point contended for by the plaintiffs is nearly due southwest; and it is only by a misinterpretation of the order that the plane of division between the parties is supposed, by reason of a misapprehension of the facts by this court, to have been so placed as to cut through the ore bodies.

There is some evidence in the record that, about the time the injunction was applied for, certain employes of the defendant were engaged in creating smoke in the crosscut extending south from the disputed ore bodies, and that by natural draft through this opening this smoke found its way into the workings of the plaintiffs within the Minnie Healy ground. It created discomfort to plaintiffs' employes, and temporarily stopped operations. It appears, however, that there was a controversy between the parties over the use of that crosscut; the plaintiffs' employes having attempted to put in a bulkhead near the point A to exclude the defendant's employes from the workings to the south. The smoke seems to have been created for the purpose of preventing the completion of this obstruction, and not to interfere with plaintiffs' mining. This crosscut is one of defendant's workings, and, by the terms of the modified order made by this court, the defendant and its employes were entitled to use it as a passageway to all the workings in the Gambetta and Piccolo claims south of the vertical plane for the purpose of inspection and repairs. (26 Mont. 265, 67 Pac. 1134.) The district court doubtless entertained the view that the occurrence was one of the incidents of a squabble for the possession and control of this opening, and was not intended to be a continuing nuisance, so as to interfere with the plaintiffs in the prosecution of their ordinary mining operations. As the evidence of the circumstances attending the incident is not very clear, and as the conclusion drawn from it by the district court is probably correct, this court will not reverse its action.

Let the order be affirmed.

Affirmed.

ALLEN, RESPONDENT, v. AJAX MINING COMPANY ET
AL., APPELLANTS.

(No. 2,069.)

(Submitted May 24, 1904. Decided June 13, 1904.)

*Mining Corporations—Sale of Property—Authority Given by
Statute—Impairing Obligation of Contract — Constitution-
ality of Statute.*

In a suit by a minority stockholder of a mining corporation to restrain the sale of the corporate property, *held*, as to a mining corporation organized between 1889 and 1898, the authority conferred on such corporation to sell its property by Laws of 1899, page 113 (commonly known as "House Bill 132") was not violative of the Federal Constitution (Art. I, Section 10) and the Constitution of the State of Montana (Art. III, Section 11), as impairing the obligation of contracts.

Appeal from District Court, Lewis and Clarke County; J. M. Clements, Judge.

SUIT by Otis R. Allen against the Ajax Mining Company and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Messrs. H. G. & S. H. McIntire, for Appellants.

It is evident that the lower court in granting the injunction complained of herein had in mind and followed the decision of this court in *Forrester v. Boston & Montana Consol. Min. Co.*, 21 Mont. 544, and it must be conceded that if said decision states the law as it now exists in this state, the action of the lower court under the facts presented in respondent's complaint was correct. Necessarily in order to reach its decision the lower court must have disregarded and held invalid the Act of the Sixth Legislative Assembly, adopted February 28, 1899, commonly known as "House Bill 132." We shall contend that said Act is a valid exercise of the legislative power and that

therefore the action of the lower court in granting the injunction in question was erroneous.

No act of the legislative assembly ought to be held invalid unless it plainly appears, beyond a reasonable doubt, that the act contravenes some provision either of the Federal or of the State Constitution; and that if any doubt exists as to an alleged repugnancy between the Constitution and the statute, such doubt must be resolved in favor of the validity of the statute. Further, that "Constitutions of a state are distinguished from the Constitution of the United States in this: 'The government of the United States is one of enumerated powers; the National Constitution being the instrument which specifies them, and in which authority should be found for the exercise of any power which the national government assumes to possess. In this respect it differs from the constitutions of the different states, which are not grants of powers to the states, but which apportion and impose restrictions upon the powers which the states inherently possess.' (Cooley on Const. Lim. p. 10.) Therefore a state legislature is not acting under enumerated or granted powers, but rather under inherent powers, restricted only by the provisions of their sovereign constitution." (*State v. French*, 17 Mont. 54-56.) And further, that in the construction of constitutions all provisions *in pari materia* are to be construed together so as to arrive at the meaning and intent of any particular provision.

The case of *Forrester v. B. & M. Co.*, 21 Mont. 544, was decided November 28, 1898, the Act of the legislature referred to was adopted February 28, 1899, and was undoubtedly passed to obviate the restraint imposed by the common law upon the alienation of property belonging to solvent, prosperous and going mining corporations. For the purpose of this argument it may be conceded that the relations surrounding corporations and stockholders are contractual in their nature, and that such relations are three-fold. (1) That between the state and the corporation. (2) That between the corporation and its stockholders. (3) That between the stockholders *inter sese*.

The constitutional provisions which it is said the statute in question contravenes are Section 10 of Article I of the Federal Constitution which prohibits the several states from passing any law impairing the obligation of contracts, and the like provision found in Section 11 of Article III of the Montana Constitution. In connection with this last provision consideration must be given to Section 2 of Article XV, which provides: "That no charter of incorporation shall be granted, extended, changed or amended by special law * * * but the legislative assembly shall provide by general law for the organization of corporations hereafter to be created; Provided that any such laws shall be subject to future repeal or alterations by the legislative assembly," and Section 3 of Article XV, which reads: "The legislative assembly shall have the power to alter, revoke or annul any charter of incorporation existing at the time of the adoption of this Constitution, or which may be hereafter incorporated, whenever in its opinion it may be injurious to the citizens of the state."

As far back as the *Dartmouth College Case*, 4 Wheat. 518, it was held by the Supreme Court of the United States that the charter of a corporation is a contract within the meaning of the said clause of the Federal Constitution and consequently protected from impairment by a state legislature. It was suggested in the concurring opinion of Mr. Justice Story in that case that it would be competent for the legislature to reserve the power to repeal or alter the grant of franchises embodied in the charter of a corporation. (Thompson's Commentaries on the Law of Corporations, Vol. 4, Section 5408.) It is well known that the several states were quick to avail themselves of this view of Judge Story, and we find also that the legislative assembly of the territory and state of Montana has from an early day reserved the power to alter, amend or repeal any of the laws of the territory or state relating to corporations. This reservation is found in Section 21, p. 410, Acts 1871-2, which was in turn re-enacted in the revision of 1879, Rev. Stat. 1879, p. 454, Sec. 264, in the compilation of 1887, Comp. Stat.

1887, p. 730, Sec. 466, and in the Civil Code of 1895, Section 394 and Section 550. The question then arises whether the statute in question is within the reserved power. (Thompson's Work on Corporations, Vol. 1, Section 90.) The cases construing this reserved power are practically innumerable and it is a difficult if not impossible task to reconcile them. This confusion would probably not have arisen if the underlying principle had been kept in mind, that the reservation is as much a part of the contract as the grant itself, in other words, that the grant, the authorization for corporation existence, and the relations flowing therefrom, as between the state and the corporation, the corporation and its stockholders, and between the stockholders, have all been taken and assumed with the understanding that they might be altered or repealed whenever the state saw fit to do so. As expressed by the Supreme Court of California in *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, s. c. 42 Pac. 229: "When an individual becomes a stockholder in a corporation it is with the implied assent on his part to the right of the legislature to alter and amend the law within the scope of the constitutional provision and is as binding upon him as a contract to like effect of his own making would be." So far as we are aware the question is *res integra* in Montana, but "in the absence of a controlling precedent of our own, it is a salutary general rule to follow the decision of the Supreme Court of the United States." (*Ruby Chief M. & M. Co. v. Prentice*, 52 Pac. 210.) In support of our contention that the law in question is valid and clearly supported by the weight of authority we shall cite only a few cases such as, in our opinion, are the most analogous to the facts of the case at bar, and so far as possible, only those of the most recent date. (*Northern Central R. Co. v. State of Maryland* (1902), 187 U. S. 258, 267; *Looker v. Maynard* (1900), 179 U. S. 46; *Gregg v. Granby* (1901), 164 Mo. 616; *C. H. Venner Co. v. U. S. Steel Corp.* (1902), 116 Fed. 1013; *Williams v. Hall* (1900), 55 S. W. 706; Thompson on Corporations, Sec. 3034; 2 Cook on Corporations, Sec. 501; *In re Empire City Bank*, 18 N. Y. 199;

In re Lee's Bank, 21 N. Y. 9; *In re Reciprocity Bank*, 22 N. Y. 9; *McGowan v. McDonald*, 111 Cal. 57, 43 Pac. 418; *Bissell v. Heath*, 98 Mich. 472, 57 N. W. 585; *Dam Co. v. Gray*, 30 Me. 547; *Sleeper v. Goodwin*, 67 Wis. 577, 31 N. W. 335; *Spring Valley Water Works v. Schottler*, 110 U. S. 347; *Sinking Fund Cases*, 99 U. S. 700; *Market St. Ry. v. Hellman* (1895), 109 Cal. 571; *Durfee v. Old Colony & F. R. Ry. Co.*, 5 Allen, 240; *Crease v. Babcock*, 23 Pickering, 342; *Buffalo, etc. R. R. v. Dudley*, 4 Kernan (N. Y.), 336, 348, 354; *Northern R. R. v. Miller*, 10 Barbour, 282; *Madow Dam Co. v. Gray*, 30 Me. 547; *Old Town, etc. R. Co. v. Veasie*, 39 Mr. 580; 1 Thompson on Corporations, Secs. 67, 75, 89; 4 Thompson on Corporations, Secs. 5409, 5410, 5411, 5417.)

Again, inasmuch as the statute provides (Section 2) that if a disposition of all the company's property is had the corporation shall thereby be dissolved, it may be construed as a method of repeal of the charter. That the right to repeal, under the reserved power, either wholly or in part and without the consent of the stockholders, exists is unquestionable (*Deposit Bank v. Davis Co.*, 44 L. R. A. 825, 829, *et seq.*; *Citizens Sav. Bank v. Owensboro*, 173 U. S. 636; *Williams v. Nall*, 55 S. W. 706, 708.)

The provisions for the payment to dissenting stockholders contained in Sections 2 and 3 of the Act are ample, valid and in line with similar statutes in other states. (3 Cook on Corporations (5th Ed.), Sec. 896, p. 2583.)

The Act in question is neither special nor class legislation. (*Williams v. Nall*, 55 S. W. 709; *King v. Elling*, 24 Mont. 476; *Home B. & L. Ass'n v. Nolan*, 21 Mont. 205.)

Mr. William Wallace, Jr., and Mr. Charles Donnelly, for Respondents.

Since the decision of the *Dartmouth College Case* by the Supreme Court of the United States in 1819 (4 Wheat. 504), the principles have been recognized as established (though frequently and vigorously criticized) that a corporate charter

granted by a state is, when accepted by the corporation, a contract within the meaning of Section 10 of Article I of the Constitution of the United States, and that unless power to alter or amend it has been reserved by the state which granted it, any alteration of it is an attempted impairment of that contract and so forbidden by that section. Since the announcement of these principles in the *Dartmouth College Case*, it has been the almost invariable practice of the states to reserve in their respective constitutions and laws the power to repeal, alter or amend the corporate charters granted by them. This the state of Montana has done in the sections of our Constitution and statutes cited in appellants' brief; and the authorities are all agreed that the effect of doing this is to take out of the operation of the rule laid down in the *Dartmouth College Case* a charter granted by a state reserving these rights, and to retain in the state full legislative control over it. The principle that the charter is a contract is not denied; but the reservation is read into and becomes a part of the contract, and leaves it subject to repeal, alteration or amendment at the hands of the state. As counsel for appellants have pointed out, however, the contract thus arising with the state is not the only contract incident to the formation of the corporation. There arises besides a contract which is spoken of as a contract between the stockholders themselves, or as a contract between the corporation on one hand and the stockholders on the other; and of this contract, as of every other, the existing law, so far as it applies, of course becomes a part. The defendant corporation was organized under the laws of the state of Montana prior to the year 1899; plaintiff has been a member of it since its organization; during all of that period it was the law of this state that no solvent, prosperous, going corporation could dispose of all of its property without the unanimous consent of all of its stockholders. Every person who became a member of a Montana corporation during that period had the security which this law gave to him, and might feel that so long as the corporation was solvent and prosperous, its property could not be disposed

of without his consent. These principles were clearly stated in the case of *Forrester v. Boston & Montana Consolidated Copper & Silver Mining Company*, 21 Mont. 544, 55 Pac. 229 (1898), and are not disputed by counsel for the appellants. On February 28, 1899, the Act in question became a law. By its terms it professes to authorize any corporation, whether then existing or thereafter to be created, and whether solvent or insolvent, to dispose of all its property, despite the protest of the holders of one-third of its stock. The effect of this enactment as applied to an existing corporation is two-fold. First, it augments the powers previously conferred upon it and so far is unexceptionable; because aside from the fact that it was a bestowal of a benefit on the corporation, the right to add to, subtract from or wholly withdraw the powers previously conferred had been expressly reserved. But, second, it altered, or rather destroyed, the contract previously existing between the stockholders themselves. That contract was that so long as the corporation remained solvent its property would not be disposed of without the consent of all of its members. Any attempt by a portion of its members to make a disposition of such property involves a violation of this contract, and any law assuming to authorize such an attempt impairs the obligation of the contract within the meaning of the constitutional prohibition. These propositions are supported by the following authorities: Cook on Corporations (6th Ed.), Sec. 501; *Zabriskie v. Hackensack & N. Y. R. R. Co.*, 18 N. J. Eq. 178; *Black v. Canal Co.*, 24 N. J. Eq. 455; *Miles v. Ry. Co.*, 41 N. J. Eq. 1; *Intiso v. State*, 53 Atl. 206; *Rahway v. Munday*, 44 N. J. Law, 395; *Johnson v. Sherman*, 66 N. J. Law, 683; *Schwartzwaelder v. Ins. Co.*, 59 N. J. Eq. 589; *In re Newark Library Ass'n*, 43 Atl. 435; *Kenosha, etc. Ry. Co. v. Marsh*, 17 Wis. 13; *Union Pac. Ry. Co. v. United States*, 99 U. S. 700; Dissenting Opinion of Mr. Justice Bradley in the *Sinkink Fund Cases*; Dissenting Opinion of Mr. Justice Field in the *Sinking Fund Cases*.

Turning now to the cases cited by appellant, it must be con-

ceded at once that some of them are opposed to the views above expressed. As counsel for appellants have said, the authorities on this question are not reconcilable, and the cases just referred to are certainly opposed to those on which we rely as justifying the order appealed from. Some of the authorities, however, cited by counsel are, as we think, distinguishable from the case at bar. In the case of *Northern Central Railway Company v. Maryland*, 187 U. S. 258, the point decided was simply that by virtue of the reserved right to amend or repeal a charter, the state had the power to change and increase the rate of taxation stipulated for in a law which had become a part of the charter. The question of the state's power over contracts between stockholders themselves was not touched upon. The same is true of the case of *Spring Valley Water Works v. Schatler*, 110 U. S. 247. An Act of the legislature was sustained affecting an alteration only in the contract existing between the state and the corporation. By the original charter (given subject to the reserved right of amendment), one method of fixing upon reasonable water rates was prescribed, and the amendment proposed to substitute another. The right to do so under the reservation was clear, and contracts between the stockholders themselves could not be affected by its exercise. In *Durfee v. Old Colony Railroad Co.*, 5 Allen, 240, the point decided was simply that a corporation organized under the laws of a state, which had reserved the right to amend its charter, could not be restrained by one of its stockholders from engaging in a new enterprise, authorized by a legislative enactment, such new enterprise being of the same kind as that for which the corporation was originally established. The case of *Williams v. Nall*, 55 S. W. 706 (Kentucky 1900), while fully sustaining the doctrine contended for by appellants, affords, as we think, an excellent illustration of the dangers that would attend on the establishment of that doctrine. We respectfully insist that this reasoning is unsound. The reserved right of a state to amend the charters of its corporations has no special force that does not inhere in the right which every state possesses to amend

any of its laws. An individual who makes a contract makes it on the faith of existing law; he knows that the law enters into it; he knows, too, that except in very rare cases there exists in the state the power of repealing, altering or amending that law which does so enter into it. But his contract is protected by the state and federal constitutions, and therefore the legislature is powerless to make a law which shall alter or impair it. How can the rule be different in the case of a corporation? How can it be lawful for the state to do to the existing contracts of an association of men what it cannot do to the contracts of a single individual? The right to change an existing law is no greater in the one case than in the other, and we think it cannot be given greater effect in the one case than in the other. It is perfectly apparent that if the principle laid down in the case of *Williams v. Nall* were to become generally recognized, capital would be slow to embark in corporate enterprises for the reason that there could never be any certainty as to what its obligations would be. This reserved power of amending corporate charters exists in the constitutions of all states; and if its effect is to render contracts of corporations uncertain, to make the rights and obligations of the contracting parties alterable at the pleasure of the legislature, no one would think of becoming a member of a corporation and assuming such responsibilities. Surely full effect can be given to the constitutional reservation by confining its action to the contract between the state and the corporation. Moreover, there appears in our statute, in existence when the defendant corporation was organized (Compiled Statutes of 1887, page 730, Sec. 466, Civil Code, Sec. 394), a clause which we have not found in any of the states from which appellants have drawn the cases on which they rely. This clause seems to recognize the distinction on which we have been insisting. After providing in the usual way that the legislature may repeal, alter or amend, etc., the statute reads: "But such amendment or repeal does not, nor does the dissolution of any such corporation, take away or impair any remedy given against such corporation, its stock-

holders or officers, for any liability which has been previously incurred." Had the stockholders of the defendant corporation, on the day it was organized, signed a formal agreement, binding upon each other, that so long as its business prospered they would not dispose of its property, unless all consented to do so, no one would doubt that this contract was independent of the contract between the state and the corporate body; nor would any one doubt that a law authorizing some of the contracting parties to violate this contract, and do what all had agreed not to do, would impair its obligation. And yet such a contract was made just as effectively with each man who became a member as if it had been made the subject of a special written agreement; and the legislature has no more right to impair its obligation than if it had been thus independently made. Nor can the statute be regarded as simply effecting the dissolution of a corporation and therefore within the power reserved. The right of the state to repeal the corporate powers which it has granted, whenever the interest of the state requires their repeal, is of course incontestable; but this statute does not do this. It empowers the holders of two-thirds of the stock to dissolve the corporation, and this notwithstanding their positive engagement to continue it. It is not reasons of state that prompt a dissolution, but the mere personal inclination of the majority stockholders to override the will of the minority. And besides, this statute assumes, not simply to authorize the dissolution of a solvent corporation, but to deprive the minority stockholders of their voice in the disposition of its property. This the legislature cannot do.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On May 3, 1904, the respondent, as plaintiff, commenced an action in the district court of Lewis and Clarke county, the object of which was to secure an injunction restraining the defendants from disposing of certain mining property belonging

to the defendant, Ajax Mining Company, a Montana corporation, to the National Prospecting & Development Company, a New Jersey corporation. The defendants Babcock, Marlow, Larson, Tracy and Smith own and control 81,900 shares of the outstanding capital stock of the Ajax Mining Company, that being all the capital stock outstanding, except 100 shares owned by the plaintiff. This mining company is a prosperous, going concern, operating certain properties in Broadwater county, Montana. The defendants Babcock, Marlow, Larson, Tracy and the plaintiff are the directors of the company, which was organized and empowered to "carry on the business of mining, purchasing, selling and dealing in mining property, running tunnels, appropriating ground for other necessary mining purposes; and the mining, smelting, reduction and shipment and selling ores, building mining improvements, constructing mills, and all other purposes incident to the business of mining or connected therewith." In April, 1904, the National Prospecting & Development Company made a proposal to purchase all the property of the Ajax Mining Company, paying therefor forty per cent. of the capital stock in the New Jersey company. After consideration of this proposal, the defendant directors passed a resolution calling a meeting of the stockholders of the Ajax Mining Company for the purpose of considering the question of accepting such proposal to purchase and acquire all the property and assets of every kind belonging to that company upon the terms proposed, and directing notice of such meeting to be given as required by law. Pursuant to this resolution the defendant directors caused a notice of such stockholders' meeting to be published, but, before this meeting was held, this action was commenced by the plaintiff, who did not consent to such sale. The plaintiff alleged that the defendant stockholders intended to accept the offers of the National Prospecting & Development Company, and intended to sell and convey to it all the property of the Ajax Mining Company, and would do so unless restrained by the court. Upon the filing of this complaint and the issuance of summons, the district court, on the

application of the plaintiff, issued a temporary injunction restraining the defendants from voting or allowing to be voted any of the capital stock of the Ajax Mining Company in favor of the sale of the property, and from taking any steps or proceedings preparatory to, or looking towards, the consummation of such sale. From the order granting this injunction, the defendants appealed.

It is conceded that the only question involved is the constitutionality of an Act of the Sixth legislative assembly, entitled "An Act to enlarge the powers of mining corporations to dispose of, sell, lease, mortgage, exchange, or otherwise convey, all or any part of the property of such corporations, and to authorize and empower such corporations to dispose of, sell, lease, mortgage, or otherwise convey, the whole or any part of the property of such corporations, and to protect stockholders dissenting from such action of such corporations," passed over the governor's veto February 28, 1899 (Session Laws 1899, p. 113), and commonly known as "House Bill 132." That Act, in substance, provides that the board of directors or trustees of any mining corporation organized under the laws of either the territory or state of Montana, whether before or after the passage of the Act, and whether the same is solvent or insolvent, or is a going or prosperous concern, or otherwise, shall have the power, and, upon request of stockholders representing at least one-half of the outstanding capital stock, it shall be their duty, to call a meeting of the stockholders for the purpose of considering the question of selling, leasing, mortgaging, exchanging, or disposing of the whole or any part of the property of such corporation for other property, or of the whole or part of the capital stock of any other corporation, whether domestic or foreign. Provision is then made for the method of calling such stockholders' meeting, and, upon the concurring vote of holders representing two-thirds of the outstanding capital stock, the directors shall have full power and authority to carry out the sale, lease, mortgage or exchange or other disposition or conveyance of the whole or any part of the property of said

corporation, to the same extent as if all the stockholders of the corporation had consented thereto.

Section 2 provides that, if a disposition of all the property of the corporation shall be made, the corporation shall thereby be dissolved.

Section 3 provides for the protection of dissenting stockholders by payment of the appraised value of their stock; the appraisers thereof to be appointed by the district court of the county wherein is situated the principal place of business of the corporation; all expenses to be borne by the corporation, its grantee or vendee.

Section 4 provides for an appeal to the district court from such award, and the ascertainment of the value of the stock by a jury, as in condemnation proceedings provided for by law, and for the rendition of judgment and execution in favor of the dissenting stockholder for the award and expense and cost of the proceedings, which judgment shall be a lien upon all the real property so disposed of, superior to the rights of the grantee or vendee, the claims of dissenting stockholders being equal liens upon the property. Upon the payment of the claims, the dissenting stockholder shall cease to have any further interest in the corporation, and his stock shall become the property of the party satisfying the judgment or appraisal.

If this Act is valid, the district court erred in issuing the injunction.

It is contended by respondent that the Act is invalid, for the reason that its enforcement would impair the obligation of corporation contracts, and therefore the Act violates Section 10, Article I, of the Constitution of the United States, and Section 11, Article III, of the Constitution of Montana.

By the decision of the Supreme Court of the United States in the *Dartmouth College Case* in 1819 (*Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629), it was finally determined in this country that a charter granted by a state to a corporation became, when accepted by the corporation, a contract, within the meaning of the Federal Constitution, and

that any legislative enactment which attempts to alter or amend it in any substantial particular impairs the obligation of that contract, and is void, unless the power or authority to alter or amend such charter is reserved by the state which granted it. In his concurring opinion in that case, Mr. Justice Story, after citing with approval *Wales v. Stetson*, 2 Mass. 143, 3 Am. Dec. 39, to the effect that the legislature cannot modify the charter of a corporation unless the power is reserved in the act of incorporation, emphasizes his approval of that doctrine by saying: "If the legislature mean to claim such authority, it must be reserved in the grant."

It is a part of the history of our jurisprudence that the states were quick to seize upon the suggestion of Mr. Justice Story, and have, with singular unanimity, adopted constitutional and statutory provisions reserving to themselves the right and authority to alter or amend all corporation charters. Prior to the adoption of the Constitution, the territory of Montana had made such reservation as early as 1871, and a like provision was carried forward in the revision of 1879, in which is comprised a comprehensive article containing all the then existing laws with reference to the organization of corporations for industrial and productive purposes, and in which is found this provision: "Sec. 264. The legislature may at any time alter, amend or repeal this article. * * *" This remained in force until the compilation of 1887. Chapter 25, Fifth Division, Compiled Statutes, was then adopted, embracing the laws then in force respecting the organization of such corporations; and this included Section 466, which reads as follows: "Séc. 466. The legislature may at any time alter, amend or repeal this chapter. * * *" This chapter remained in force until superseded by Division I, Part IV, of our Civil Code of 1895, which furnishes a complete system of laws relating to the formation of corporations in this state. Sections 394 and 550 of that part of the Civil Code read as follows:

"Sec. 394. Every grant of corporate power is subject to alteration, suspension or repeal, in the discretion of the legislative assembly."

"Sec. 550. The legislative assembly may at any time amend or repeal this part, or any title, chapter, article or section thereof, and dissolve all corporations created thereunder. * * *"

That there might not be any question as to the authority of the legislature to make such reservations, the Constitution (Article XV, Sec. 2) provides: "Sec. 2. No charter of incorporation shall be granted, extended, changed or amended by special law, * * * but the legislative assembly shall provide by general law for the organization of corporations hereafter to be created: provided, that any such laws shall be subject to future repeal or alterations by the legislative assembly."

It is apparent, then, that when the Ajax Mining Company was organized, some time between 1889 and 1898, there existed and was read into and made a part of its charter the then existing statute, which gave notice to all concerned that the legislature of Montana, acting under the constitutional provision above, might at any time alter, amend or repeal the law under which it existed.

Respondent contends that the contractual relation respecting a corporation is of a threefold character, namely, first, a contract between the state and the corporation; second, a contract between the corporation and its stockholders; and, third, a contract between the stockholders *inter sese*, and that, while the state might properly reserve to itself the right and the authority to change the contract between itself and the corporation, it cannot, and it was never intended that it should, in any manner interfere with or impair the obligation of the contract existing among the stockholders themselves, and that any attempt to do so is a violation of the Federal Constitution, and authorities are cited in support of this position. But it is to be observed that in all these legislative enactments the state did reserve to itself the right to repeal the law under which this corporation was organized, and, had it done so, the corporation would have been destroyed, except for the purpose of winding up its business. Yet it cannot be said that the state did not have this power, for the statute authorizing it was in existence when the

corporation was organized, and was read into and became as much a part of the charter as if expressed in terms in that instrument itself. And if the state reserved the right and power by a repeal of the law creating the corporation to destroy it, it certainly did less when, instead of repealing the law, it amended it by House Bill 132.

It is true that at the time of the formation of the Ajax Mining Company, and for several years thereafter, the majority stockholders of a corporation could not dispose of all the property of a prosperous, going concern without the consent of the minority. (*Forrester et al. v. Boston & Montana C. C. & S. M. Co.*, 21 Mont. 544, 55 Pac. 229.) But that doctrine prevailed only because the state had not seen fit to exercise the right which it possessed to call into activity this dormant power theretofore reserved to itself. And it is likewise true that the plaintiff, Allen, when he subscribed for stock in this company, did so, charged with the full knowledge of the constitutional and statutory provisions then existing, under which the legislature might at any time alter, amend or repeal the provisions of the law which was made a part of its charter; and he must therefore be treated as having given his tacit consent that such changes might be made at any time as in the wisdom of the legislature might be necessary, and this as fully as if he had signified such consent by a writing duly subscribed by himself.

It cannot be said, then, that the enforcement of the provisions of House Bill 132 will impair the obligation of any contract which the plaintiff entered into when he became a stockholder of this company, for the reason that the reservation of this authority to alter, amend or repeal the law under which the company was organized became as much a part of the law of its creation as any other provision respecting it, and became a part of the charter, modifying what would otherwise have been an absolute grant. (4 Thompson on Corporations, 5408.)

It is to be understood, too, that this reservation possesses equal vigor, whether contained in the charter of the particular corporation itself, or in the Constitution or general laws of the

state under which the corporation is organized. While there may be some slight conflict in the authorities, the great weight of authority clearly and unequivocally sustains such statutes. (*Market Street Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225; *Looker v. Maynard*, 179 U. S. 46, 21 Sup. Ct. 21, 45 L. Ed. 79, and cases cited; *Northern Central Railway Co. v. Maryland*, 187 U. S. 258, 23 Sup. Ct. 62, 47 L. Ed. 167; *Venner Co. v. Steel Corporation* (C. C.), 116 Fed. 1012.) The theory upon which these statutes are upheld is that whatever rules or regulations for the management, operation or control of a corporation which the legislature might have incorporated in the law under which the corporation was organized may afterwards properly be ingrafted on its charter by virtue of this reserved power existent at the time of the formation of the corporation. (*Sinking Fund Cases*, 99 U. S. 500, 25 L. Ed. 496; *Spring Valley Water Works v. Schottler*, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. Ed. 173; *Market St. Ry. Co. v. Hellman*, above; *McGowan v. McDonald*, 111 Cal. 57, 43 Pac. 418, 52 Am. St. Rep. 149; *Williams v. Nall*, 108 Ky. 21, 55 S. W. 706.) A review of the authorities citing numerous instances of the enforcement of such statutes is found in 4 Thompson on Corporations, Sec. 5411.

We are therefore of the opinion that the statute is not open to the attacks made upon it, and that the district court erred in granting an injunction. The order is reversed and the cause remanded.

Reversed and remanded.

MR. JUSTICE MILBURN, not having heard the argument, takes no part in this decision.

CAPELL ET AL., APPELLANTS, v. FAGAN, RESPONDENT.

(No. 1,900.)

(Submitted May 26, 1904. Decided June 17, 1904.)

Lost Instruments—Proof—Sufficiency.

1. Under the provisions of the Code of Civil Procedure, in order to establish the former existence of an instrument in writing, under which plaintiff claims, he is compelled to prove its execution and contents, including all the substantial parts of the lost instrument, to such an extent as to constitute a practical reproduction of the instrument in all of its substantial parts.
2. Proof of negotiations, conversations and acts of parties before, at the time of and after the execution of a written instrument, are not competent to prove its contents where the instrument is lost.
3. Where a written contract is to be proved by parol testimony, no vague, uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself, but the substance of the agreement must be proved satisfactorily.
4. While, under the statutes, the consideration need not be mentioned in a deed, yet, if it is mentioned and set forth in the deed, it becomes a substantial part of the contents thereof, and must be proven like any other of the contents on loss thereof.
5. In an action to recover a portion of a mining claim, in which plaintiffs claimed under a deed which had been destroyed, evidence considered, and held not to show the contents of the deed by such direct and positive evidence as to enable the court to say that there was a conveyance.

Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

ACTION by Carl J. Capell and others against Joseph B. Fagan. From a judgment for defendant, and from an order overruling a motion for a new trial, plaintiffs appeal. Affirmed.

Messrs. McBride & McBride, and Mr. James E. Murray, for Appellants.

“A complaint which alleges that plaintiff was the owner of and in possession of certain land, and that defendant claims an estate or interest therein, but has none, states a cause of action.” (*Rough v. Simmons*, 65 Cal. 227; *Johnson v. Vance*, 86 Cal. 129, A. C. 24 Pac. 863.)

"The allegation that plaintiff is the owner of land is in substance an allegation of *seizin in fee* in ordinary instead of technical language." (*Garwood v. Hastings*, 38 Cal. 216.)

In the case at bar defendant in his answer alleged that plaintiff had no claim to the property in controversy other than a verbal agreement for a deed. Plaintiff, replying, alleged the execution and delivery of a deed. Defendant on the trial testified that this allegation of his answer was wrong; that he had made and delivered to plaintiff a deed. Such a state of facts certainly establishes the existence and delivery of some kind of a deed. "Words are the common signs that mankind make use of to declare their intentions to one another, and when the words of a man express his meaning plainly, distinctly, perfectly, there is no occasion to have recourse to any other means of interpretation." (29 Am. & Eng. Ency. p. 849.)

"Words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the party in their technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed." (Civil Code, Sec. 2209.)

"As the term is commonly used, a deed may be defined as 'a writing under seal by which lands, tenements or hereditaments are conveyed for an estate not less than a freehold.' " (Devlin on Deeds, Sec. 5, p. 7, citing Sharswood's Blackstone's Commentaries, Vol. 2, p. 294.)

There is absolutely no doubt that the deeds that the said witnesses were testifying concerning were not leases or mortgages, but were deeds of conveyance, whereby the entire title to the portion of the Josephine lode referred to was to be and was conveyed by Fagan to Farley. The court in the case of *Sanders v. Reidinger*, 51 N. Y. Sup. 942, held that testimony that a deed had been signed and delivered was proof of a conveyance of the fee.

If a party of mature years and sound mind, being able to read and write, without any imposition or artifice to throw him off his guard, deliberately signs a written agreement, without

informing himself as to the nature of its contents, he will, nevertheless, be bound, for in such case the law will not permit him to allege, as a matter of defense, his ignorance of what it was his duty to know, nor will a court of equity assist him to avoid the consequences of his negligence. (*Walton Guano Co. v. Copelan*, 112 Ga. 319, s. c. 52 L. R. A. 268; *Gulliber v. Chicago Railroad Co.*, 59 Iowa, 416, s. c. 13 N. W. 429; *McKinney v. Herrick*, 66 Iowa, 414, 23 N. W. 767; *Minneapolis Ry. Co. v. Cox*, 76 Iowa, 306, 41 N. W. 24; *Rice v. Dwight Mfg. Co.*, 2d Cush. Mass. 80; *Hazard v. Griswold*, 21 Fed. 178; *Day v. Raguet*, 14 Minn. 273; *Taylor v. Fleckenstein*, 30 Fed. 99; *Mateer v. Missouri Pacific Ry. Co.*, 105 Mo. 320, 16 S. W. 839; *Breese v. U. S. Telegraph Co.*, 48 N. Y. 132. See, also, *Roote v. Zaller*, 2 N. Y. Sup. 742; *Little v. Little*, 2 N. D. 175, s. c. 49 N. W. 736; *Sanger v. Dun*, 47 Wis. 615; s. c. 32 Am. Rep. 789; *McKay v. Jackman*, 17 Fed. 641; *Lumley v. Wabash Ry. Co.*, 71 Fed. 21; *Royston v. Miller*, 76 Fed. 50; *Reid v. Bradley*, 105 Iowa, 220; s. c. 74 N. W. 896; s. c. 20 A. and E. Ency. 832; *Kennerty v. Etiwan Phosphate Co.*, 21 s. c. 226; s. c. 53 Am. Rep. 669; *Snelgrove v. Earl*, 17 Utah, 321; s. c. 53 Pac. 1019; *Dyar v. Walton*, 79 Ga. 466; s. c. 7 S. E. 220; *Bostwick v. Duncan*, 60 Ga. 383.)

Mr. W. A. Pennington, for Respondent.

An instrument without operative or granting words cannot operate, grant, sell or convey. It is without life, force or effect. It does nothing, admits having done nothing, and promises to do nothing. It does not convey, admit having conveyed nor promise to convey. It is a nullity. (*Metcalf v. Van Benthuyssen*, 3 Comstock N. Y. 424; Sec. 803, Tiedeman on Real Property; 9 Am. and Eng. Ency. Law, pp 93, 94, 138.)

The mere designating an instrument a deed, even by a person competent to decide what constitutes a deed, does not show its legal fact, as the term is a broad one and comprehends every possible conveyance of any right, title or interest in real or personal property by a written instrument. (Century Diction-

ary; Anderson's Dictionary of Law; Sec. 5, Vol. 1, Devlin on Deeds.)

We contend that appellants have not proved a deed of conveyance, and that it is not sufficient to merely designate a lost paper by the term deed, and to offer evidence as to some of the parts of the deed and omit any reference whatever to other parts essential to constitute a deed, and we cite the following authorities in support of our contention: Code of Civil Procedure, Par. 3228; Code of Civil Procedure, Par. 3146, Subd. 14; Rice on Evidence, Vol. 2, p. 1010; Jones on Evidence, Vol. 1, Sec. 228; *Taylor v. Riggs*, 1 Peters, 591, 26 U. S. 589; *Renner v. The Bank of Columbia*, 9 Wheat. 581, 22 U. S. 580; *Tisdale v. Tisdale*, 64 Am. Dec. 775 (2 Sneed 596); *Metcalf v. Van Benthuyssen*, 3 Comstock, N. Y. 424; *Edward v. Noyes et al.*, 65 N. Y. 125; *McDonald v. Thompson*, 26 Pac. 146 (Colo.); *Rhodes et al. v. Vinsen et al.*, 52 Am. Dec. 685 (9 Gill); *Butler v. Butler*, 5 Harr. (Del.) 178; *Davis v. Sigourney*, 8 Metc. (Mass.) 487; *Wallis v. Wallis*, 114 Mass. 510.

MR. COMMISSIONER CLAYBERG prepared the following opinion for the court:

Appeal by plaintiffs from a judgment against them and from an order overruling their motion for a new trial.

The action was instituted to quiet the title to an undivided one-fourth interest in the Josephine quartz lode mining claim. Plaintiffs claim ownership and possession of the property in controversy. Defendant claims ownership and right of possession of an undivided one-half of the premises, admitting that plaintiffs are entitled to the other half, and that each are entitled to an undivided one-eighth of the entire claim. Concededly, the entire one-fourth interest in question formerly belonged to defendant, and plaintiffs contend that it was conveyed to one Farley, their predecessor in interest, by defendant in February, 1898, by a deed which was not acknowledged so as to entitle it to record, and that the deed was afterward destroyed by fire. The defendant, on the other hand, contends that he agreed to

convey only an undivided one-eighth—or one-half of the one-fourth—to Farley, and that he retained, and still held and owned, the other undivided one-eighth. Both parties agree that an instrument in writing was drawn by one Harry Lynch in his saloon in Butte, and plaintiffs contend that by this instrument the full one-fourth was conveyed to Farley. There can be no doubt but that a written instrument was drawn by Lynch, which was executed by defendant, and delivered to Farley in February, 1898. Appellants have alleged their source of title as being by this written instrument. The burden, therefore, was upon them to establish the title alleged. This written instrument was not recorded, because it was never acknowledged by the grantor, and, it having been destroyed by fire, appellants attempted to establish its former existence and contents by parol evidence.

The provisions of our Code of Civil Procedure relative to such proof are as follows: Section 3106. "Primary evidence is that kind of evidence which, under every possible circumstance, affords the greatest certainty of the fact in question. Thus, a written instrument is itself the best possible evidence of its existence and contents." Section 3107. "Secondary evidence is that which is inferior to primary. Thus, a copy of an instrument or oral evidence of its contents, is secondary evidence of the instrument and contents." Section 3131. "There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases: (1) Where the original has been lost or destroyed; in which case the proof of the loss or destruction must first be made. * * * In the cases mentioned in Subdivisions 3 and 4, a copy of the original or of the record must be produced; in those mentioned in Subdivisions 1 and 2, either a copy or oral evidence of the contents." Section 3132. "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents

of the writing, except in the following cases: (1) Where a mistake or imperfection of the writing is put in issue by the pleadings. (2) Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in Section 3136, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term 'agreement' includes deeds and wills, as well as contracts between parties." Section 3146: "In conformity with the preceding provisions, evidence may be given upon a trial of the following facts: * * * (14) The contents of a writing, when oral evidence thereof is admissible." Section 3228: "The original writing must be produced and proved, except as provided in this part. If it has been lost, proof of the loss must first be made before evidence can be given of its contents. Upon such proof being made, together with proof of the due execution of the writing, its contents may be proved by a copy, or by a recital of its contents, in some authentic document, or by the recollection of a witness, as hereinbefore provided."

It is apparent from these provisions that, in order to establish the former existence of this instrument in writing, appellants were compelled to prove its execution and contents. The rights of the parties in this controversy rested upon this written instrument, and could only be settled by the application of its terms to the questions in controversy. Its terms could not be so applied until its contents were established. The word "contents," used in this statute, evidently includes all the substantial parts of the lost instrument, and therefore proof of such contents requires a practical reproduction of the instrument in all of its substantial parts.

The law is well settled that proof of the negotiations and conversations and acts of the parties before, at the time of, and after the execution of a written instrument are not competent to prove its contents, where the instrument is lost. (*Nicholson v. Tarpey*, 89 Cal. 617, 26 Pac. 1101; *Nicholson v. Tarpey*, 124 Cal. 442, 57 Pac. 457; *Tayloe v. Riggs*, 1 Pet. 591, 7 L.

Ed. 275; *Kimball v. Morrell*, 4 Me. 368; *Richardson v. Robbins*, 124 Mass. 105.) The greater part of the record is composed of this class of testimony, and under the above authorities cannot be considered.

It being conceded that some sort of paper was executed and delivered to the plaintiffs' predecessor in interest, and has been destroyed by fire, the only question for our consideration is, did appellants satisfactorily prove its contents by competent testimony?

The following rule as to proof of the contents of a lost instrument was announced by the Supreme Court of the United States at an early date, and has been generally followed by our courts of last resort since that time: "When a written contract is to be proved, not by itself, but by parol testimony, no vague, uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself. The substance of the agreement ought to be proved satisfactorily; and, if that cannot be done, the party is in the condition of every other suitor in court who makes a claim which he cannot support. When parties reduce their contract to writing, the obligations and rights of each are described and limited by the instrument itself. The safety which is expected from them would be much impaired if they could be established upon uncertain and vague impressions, made by a conversation antecedent to the reduction of the agreement." (*Tayloe v. Riggs*, 1 Pet. 591, 7 L. Ed. 275.)

The Supreme Court of New York, in the case of *Edwards v. Noyes*, 65 N. Y. 125, uses the following language: "Parol evidence to establish the contents of a lost deed should be clear and certain. It should show that the deed was properly executed with the formalities required by law, and should show all the contents of the deed, not literally, but substantially. If anything less than these requirements would suffice, evil practices, which it was the object of the statute of frauds to prevent, would be encouraged. * * *. As to lot 108, the plaintiff attempted to show that one Rodgers conveyed it to him by a deed

which was lost in 1835. He had no copy of the deed, but attempted to prove its contents by witnesses who had never read it, but who claimed that they had heard it read many years before the trial. They could give but a small fraction of what the deed appeared to contain. On the whole, their evidence was quite unsatisfactory."

The Supreme Court of California, in the case of *Nicholson v. Tarpey*, 89 Cal. 617, 26 Pac. 1101, uses the following language: "The material question was as to the language of the written contract. Whether lost or not, there can be no evidence, in the absence of mistake or fraud, of the intention of the parties, other than the written instrument itself. The rights of the parties must be ascertained from its terms. Code Civ. Proc. Sec. 1856. The Code expressly provides, in case of lost instruments, for oral evidence of their *contents*. Code Civ. Proc. Secs. 1855-1870, Subd. 14. Evidence of the character received in this case imposes upon the court the construction of the contract by the witness. In *United States v. Britton*, 2 Mason, 464, Fed. Cas. No. 14,650, Justice Story remarked: 'If no such copy exists, the contents may be proved by parol evidence by witnesses who have seen and read it, and can speak pointedly and clearly to its tenor and contents.' "

The Supreme Court of Arkansas, in the case of *Hooper v. Chism*, 8 Eng. 496, says: "There is no rule of law that ought, upon the ground of public policy, to be better settled than this; that wherever parties have reduced their contract or agreement to writing, the instrument itself is the best and highest evidence of what the contract or agreement really was. No matter what the conversation or representations on either side that preceded it may have been, they are all supposed to be merged in the written instrument, which is to be regarded as the conclusion agreed upon between them. A contract is the law which the parties have prescribed unto themselves, and the object of reducing it to writing is that a memorial of its terms and provisions may be preserved, and not left to depend, for proof of them, upon the uncertain and imperfect recollection of witnesses. No man's

rights would be safe, and no prudence could guard against fraud, if this were not the law; and the exceptions to it—which ought to be admitted with great caution—are more apparent than real. The rule rests upon the supposition that there is a written contract, as in the case now before the court is conceded by both parties. * * * When a party is allowed to establish the contents of a lost instrument, he must at least show with reasonable certainty what its terms and provisions were. Without making any question as to grades of secondary evidence, if no copy of the instrument exists, and parol testimony is offered, it ought to be that of a witness who has seen or read the instrument, or is otherwise enabled to speak with some degree of accuracy as to its contents, and identify it as the one executed by the party to be charged where that is disputed. Else a party relying upon a lost instrument would often be placed in a better position to take the chances of parol testimony, and the temptation would be held out to him to destroy or suppress it.” The court then quotes the language of Chief Justice Marshall in *Tayloe v. Riggs*, 1 Pet. 600, 7 L. Ed. 275.

The Supreme Court of Illinois, in the case of *Rankin v. Crow*, 19 Ill. 626, says, in regard to testimony proving the contents of a lost deed: “Fort testifies he was present when it was made; that it was read over by Jamison; that the consideration was \$110; that it was for the land in dispute; but whether it was a warranty or quitclaim deed he does not know. He professes to give no part of its contents, or even its terms, except that it was a deed for this land from Gibson to Dunn. To prove the contents of a written instrument, the vague recollections of witnesses are not sufficient to supply its place. The substance of the contract ought to be proved satisfactorily, and, if that cannot be done, the party is in the condition of every other suitor in court who has no witnesses to support his claim. When the parties reduce their contract to writing, the obligation and duties of each are described and limited by the instrument itself. The safety which is expected from them would be much impaired if they could be established upon uncertain and vague impressions of witnesses.”

The following cases may also be examined upon the question as to the character of proof required in cases of proof of the contents of lost instruments: *Metcalf v. Van Benthuyzen*, 3 N. Y. 424; *Madeira's Heirs v. Hopkins*, 12 B. Mon. 595; *Elwell v. Walker*, 52 Iowa, 256, 3 N. W. 64; *Loftin v. Loftin*, 96 N. C. 94, 1 S. E. 837; *Kimball v. Morrell*, 4 Me. 386; *United States v. Britton*, 2 Mason, 464, Fed. Cas. No. 14,650; *Edwards v. Rives*, 35 Fla. 89, 17 South. 416; *Tisdale v. Tisdale*, 2 Sneed, 596, 64 Am. Dec. 775.

Testing the testimony offered by plaintiff in this case by the rules announced in the foregoing decisions, we must conclude that the substantial contents of the lost instrument were not proved by such clear and satisfactory evidence as is required by these rules, and that the court did not err in finding that there had been made no deed proven in the case. We find on investigation of the record that the only direct and positive testimony offered by appellant as to the contents of the instrument were the names of the parties and a description of an undivided one-fourth interest in the Josepine lode mining claim. Only two witnesses were examined as to the contents of the instrument, viz., Farley, the grantor, and Lynch, the person who drew it. Both of these witnesses testified to its execution and delivery, gave the names of the parties thereto, and stated the description of the land mentioned in it. They further stated that it was drawn by Lynch at the request of Farley and Fagan. That there was presented to Mr. Lynch a blank form of deed, and an old deed conveying the property in question to defendant Fagan; that Lynch filled up all the blanks in the form of deed presented, and inserted the description. Farley says nothing concerning any of the contents except the description, the names of the parties and the consideration. As to the consideration he says: "The consideration, if I remember right, named in the new deed, was one dollar." Lynch says: "The blank which was brought to me by Mr. Fagan and Mr. Farley was a regular form of deed, but as to details I have forgotten it. The consideration was filled up. I cannot say whether or not there

was a consideration named in the deed, but I think there was. My recollection is that it was one dollar. I cannot state positively that the consideration was put in the deed. I cannot state at this time, but I think that it was."

While, under the statutes, the consideration need not be mentioned in a deed, yet if it is mentioned and set forth in the deed, it becomes a part of the contents of such deed, and must be proven like any other of the contents thereof. The testimony as to the consideration named in the instrument is uncertain and equivocal. There is no testimony disclosed in the record as to any of the remaining contents of the instrument in question. There is nothing to show the character of the paper—if a conveyance, whether it was a bargain and sale, warranty, or mere quitclaim deed—or to disclose the character of the title. There are no granting words proven. So far as the proof disclosed in the record, the paper simply consisted of the names of the parties grantor and grantee, and a description of the premises. All the remaining contents are left entirely to presumption.

An instrument cannot be given the effect of a conveyance unless it contains words of grant. The mere use of the word "deed" by witnesses is a mere conclusion of the witnesses, and it cannot be presumed that the written instrument in this case was a deed of conveyance, at least without proof that it contained sufficient words of grant.

Again, witness Lynch was asked upon cross-examination whether or not he did not, on the 31st day of May, 1900, at the city of Butte, state to Fagan and his attorney, Walsh, in the presence of both of them, that he had forgotten all about the transaction; that the whole matter had passed out of his recollection; that he did not know what was the consideration, or what interest was named in the paper; and that they were trying to give Fagan the worst of it, and he would be very glad to help him if he could. Lynch denied having such a conversation, but both defendant Fagan and his attorney testified positively and directly that such conversation was had. Aside from

the inherent improbability that Lynch, who was keeping a saloon, and not in the business of preparing conveyances, could remember for over two years the contents of a paper which he "filled in," having testified to no particular attendant circumstances which would have had a tendency to fix the facts in his mind, we have the positive testimony of two witnesses that he afterwards stated to them he had forgotten all about what the contents of the instrument were.

We are of the opinion that appellants' testimony, as disclosed by the record, did not so show the contents of the written instrument by such direct and positive evidence as to enable the court below or this court to say that it was a conveyance of the one-fourth interest in the Josephine lode mining claim.

It follows from this that the decree of the court, and the order appealed from, should be affirmed, and we recommend their affirmance.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order are affirmed.

MR. JUSTICE MILBURN was absent at the time of the delivery of this opinion, and takes no part therein.

STATE, RESPONDENT, v. HOWARD, APPELLANT.

(No. 1,992.)

(Submitted May 25, 1904. Decided June 18, 1904.)

Robbery — Information—Charging One Under Aliases—Evidence—Admissibility — Letters—Jurors — Competency—Ownership of Stolen Property—Insanity.

1. Where an information was against one as George Howard, alias James Howard, alias Joe Kirby, a contention that the information did not conform to the requirements of Sections 1832 and 1834, Penal Code, is without

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merit; the information having charged his prior conviction, and the different names being for the purpose of identifying him as the person previously convicted.

2. An information on a prosecution for robbery which charged that the property was taken by means of force and putting in fear, and that it was taken from the person and possession and from the immediate presence of a specified person, did not charge more than one offense.
3. The granting or refusing of a motion for a continuance in a criminal case is within the sound discretion of the trial court.
4. The action of the trial court in refusing or allowing a continuance will not be interfered with on appeal unless there has been an abuse of discretion.
5. Where jurors state on their *voir dire* examination that they were prejudiced against the defense of insanity, but upon further examination say that they would treat it like any other defense; would follow the court's instructions thereon, and, if the instructions should in any manner differ from their own ideas, they would follow the instructions, they have qualified themselves as competent jurors.
6. Where a venireman in a criminal case stated on his *voir dire* that he had read the newspaper accounts of the alleged robbery, and had formed an opinion, but not a fixed one, and on re-examination he said he could entirely discard the opinion thus formed, and give the defendant as fair a trial as if he had never heard of the case, he was competent.
7. Where defendant, while engaged in attempting to rob the safe on a train, robbed a mail clerk, on a prosecution for the robbery of the mail clerk it was proper to admit evidence as to all the details of the attempted robbery of the train, and a conspiracy therefor.
8. Where, on a criminal prosecution, the state offered in evidence a letter claimed to have been written by accused, and a witness testified that he was familiar with defendant's handwriting, and that the letter looked like his writing, and that the signature was his signature, there was a sufficient identification of the letter as one written by defendant.
9. Where a letter improperly admitted was immaterial, and the only defense made in the case was insanity, the admission of the letter was harmless error.
10. In a criminal case, error in the admission of evidence, to secure a reversal of a judgment of conviction, must be prejudicial to the defendant.
11. Where the warden of the penitentiary testified that defendant had been confined in the penitentiary, and there was admitted in evidence a commitment against him, and it appeared that the date of his commitment and release corresponded with the requirements of the commitment, and other witnesses testified that they knew defendant when he was in the penitentiary, an objection that defendant was not identified as the man to whom the commitment referred was of no merit.
12. The proper manner of proving a prior conviction is not by the introduction of the commitment, but by the record of the judgment. (Code of Civil Procedure, Sec. 3193.)
13. Where, on a prosecution for robbery, a witness on direct examination testified that he had been confined in the penitentiary, and that he had known the defendant for about fifteen months, and had observed his demeanor at the penitentiary, and that he thought defendant insane, questions put to him on cross-examination for the purpose of showing that he was a member of the conspiracy which resulted in the robbery were not improper, as exceeding the proper limits of cross-examination.
14. Where a witness for defendant had testified that he had been in the penitentiary, and that he was then in jail, a question put to him on cross-examination as to whether he was not in jail on a charge of holding up a saloon was not erroneous, as tending to degrade the witness.
15. The question was not prejudicial, as not proper cross-examination.

16. On a prosecution for robbery, the fact that the money taken was in prosecutor's possession is sufficient evidence of ownership to sustain a conviction.
17. On a prosecution for robbery, the question whether defendant was, by reason of insanity, incapable of having the criminal intent necessary to the commission of the crime, was raised by a plea of not guilty.
18. On a prosecution for robbery, the question whether defendant was, by reason of insanity, incapable of having the criminal intent necessary to the commission of the crime, was a question of fact for the jury.
19. Penal Code, Section 2521, provides that when an action is called for trial, or at any time during a trial, or when the defendant is brought up for judgment, if a doubt arises as to the sanity of defendant, the court must order the question as to his sanity to be submitted to a jury. *Held*, that the doubt mentioned in the statute is one arising in the mind of the judge, and one which he must determine.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

GEORGE HOWARD, alias James Howard, alias Joe Kirby, was convicted of robbery. From the judgment, and an order denying a new trial, he appeals. Affirmed.

Mr. Alexander Mackel, and Mr. William Meyer, for Appellant.

Mr. James Donovan, Attorney General, for the State.

MR. COMMISSIONER CALLAWAY prepared the following opinion for the court:

The defendant was convicted upon an information accusing him of the crime of robbery, and charging his prior conviction of a like offense as the ground for a heavier punishment. He was sentenced to imprisonment at hard labor for thirty years. This appeal is from the judgment and an order denying a new trial.

1. He was informed against as George Howard, alias James Howard, alias Joe Kirby. He makes the point that the information does not sufficiently conform to the requirements of Sections 1832, 1833 and 1834, Penal Code, in that there is no certainty as to the party charged, or as to the name of the party charged. Section 1832 of the Penal Code provides that the information must contain the name of the party. Section 1841 provides that

the information is sufficient if it can be understood therefrom that the defendant is named, or, if his name cannot be discovered, that he is described by a fictitious name, with a statement that his true name is to the county attorney unknown.

A man's name is simply the sound or sounds by which he is commonly designated by his fellows, and by which they distinguish him. It is a mere means of description. Sometimes a man is known by several different names, and it was formerly the custom, in drawing indictments, to charge him under all the names by which he was known; connecting them with the words "*alias dictus*," or with simply "*alias*." These words mean "otherwise called" or "otherwise." The county attorney attempted to be more certain than the statute requires. He charged the defendant, evidently, by three names by which the latter had been known. Had he charged the defendant as George Howard, stating that his true name was unknown, the statute would have been met, and such is believed to be the better practice.

It is readily perceived that in a given case a defendant may be prejudiced by the use of the *alias dictus* by which a number of names may be joined, and thus all read to the jury; suggesting to them that the defendant has been using assumed names. But no such prejudice resulted in this case. A like point was decided in *People v. Maroney*, 109 Cal. 277, 41 Pac. 1097, in which the court said that while, for most purposes, the need and use of the charging *alias* are done away with, it is still proper in some instances, an illustration of one of which was offered by the indictment then before the court. The indictment charged the defendant with conviction of prior offenses, and the court observed: "For the purpose of identifying him as the person who had suffered those convictions, the use of the *alias* was not only permissible, but proper." At the trial the defendant in this case was referred to sometimes as "Howard," sometimes as "Kirby," and as "Howard or Kirby." He was formerly convicted under the name of George Howard, and it seems that he gave his name to the court as Joseph Kirby. The

point urged by defendant is not well taken. (*Lee v. State*, 55 Ala. 259; *Haley v. State*, 63 Ala. 83; *Barnesciotta v. People*, 10 Hun, 137; *Kennedy v. People*, 39 N. Y. 245.)

2. The next point urged is that the information charges two offenses, in that it is alleged that the property was taken "by means of force and putting in fear," and that it was taken "from the person and possession and from the immediate presence of one W. M. Bell." It is contended that a robbery accomplished by means of force is a different kind of robbery from that accomplished by means of fear, that a robbery from the person is different from a robbery from his immediate presence, and that the information in this respect is uncertain. The defendant presented these points by demurrer, which was overruled. We think these objections are hypercritical. Robbery may be, and often is, accomplished by the concurrence of force and fear. When it is accomplished by force, fear is the usual concomitant. If one were not apprehensive of the force, he would not have the fear. So, on the second point suggested, how can there be a taking from one's person, and that taking be not from his immediate presence? Of course, the article taken might be from the immediate presence without being taken from the person. That portion of the information which is criticised is substantially similar to the one before the court in *State v. Clancy*, 20 Mont. 498, 52 Pac. 267, and is not vulnerable to the attacks made upon it by defendant. When tested by the rules prescribed by the Penal Code, it is sufficient. (*State v. Gill*, 21 Mont. 151, 53 Pac. 184.)

3. The defendant moved for a continuance, which the court denied. An examination of the affidavit upon which the motion was based shows that it was insufficient for the purpose intended, and the court's action upon the motion was clearly correct. Moreover, the granting or refusing of a motion for the continuance of a criminal case rests in the sound discretion of the court below, and the appellate court will not interfere unless there has been an abuse thereof. (*Territory v. Perkins*, 2 Mont. 467; *Territory v. Harding*, 6 Mont. 323, 12 Pac. 750; *Territory v. Roberts*, 9 Mont. 12, 22 Pac. 132.)

4. Three jurors were accepted over defendant's challenges. Two of them, when upon their *voir dire* examination, said in response to questions put by defendant's counsel that they were prejudiced against the defense of insanity. Upon examination by the county attorney and the court, they said, in effect, that they would treat it like any other defense the defendant might urge; would follow the instructions of the court thereon, and, if the instructions upon the law should in any manner differ from their own ideas, they would follow the instructions. In short, without discussing their testimony in detail, it may be said that they qualified themselves as competent jurors.

Another said that he had read the newspaper accounts of the alleged robbery, and had formed an opinion therefrom, but not a fixed one. Upon re-examination he said he could entirely discard the opinion then formed, and could give the defendant as fair a trial as if he had never heard of the case. This juror was clearly competent. (Penal Code, Sec. 2051; *State v. Mott*, 29 Mont. 292, 74 Pac. 728.)

5. The evidence showed that the defendant, together with one Cole, had entered into a conspiracy to "hold up" the Northern Pacific train near Homestake, in Silver Bow county. Accordingly they stopped the train about a mile from Homestake, and attempted to blow open the safe in the baggage car. While they were proceeding in furtherance of this conspiracy, the defendant, after having intimidated Bell, a mail clerk, by the use of a revolver, reached into Bell's pocket and took therefrom the sum of 75 cents. The taking of the 75 cents is the particular crime for which the defendant is prosecuted. At the trial the state was permitted to show the details of the entire transaction, commencing with the formation of the conspiracy in Butte, and following it out until the train was again allowed to go upon its way.

It is contended by the defendant that it was error to admit in evidence certain testimony concerning the details of the attempted "train robbery." "Robbery is the felonious taking of personal property in the possession of another, from his person

or immediate presence, and against his will, accomplished by means of force or fear." (Penal Code, Sec. 390.) It is therefore technically inaccurate to speak of a "train robbery." The meaning of the phrase, however, is clear. In this case the defendant and Cole intended to take personal property—the contents of the safe—from those who had it in charge, using such force and producing such fear as might seem to them to be necessary. It is said that the conspirators did not contemplate the robbery of Bell, and that crime was therefore not within the purview of the conspiracy. This point is not well taken. If, while a person is engaged in the commission of one felony, he commits another, evidence of the commission of both is admissible as part of the *res gestae*. (*People v. Pallister*, 138 N. Y. 601, 33 N. E. 741; *State v. Desroches*, 48 La. Ann. 428, 19 South. 250; *Seams v. State*, 84 Ala. 410, 4 South. 521; *People v. Nelson*, 85 Cal. 421, 24 Pac. 1006; *People v. Teixeira*, 123 Cal. 297, 55 Pac. 988; *Commonwealth v. Hayes*, 140 Mass. 366, 5 N. E. 264; *Dove v. State*, 37 Ark. 261; *Snapp v. Commonwealth*, 82 Ky. 173; *Kennedy v. State*, 107 Ind. 144, 6 N. E. 305, 57 Am. Rep. 99; *State v. McCahill*, 72 Iowa, 111, 30 N. W. 553, 33 N. W. 599; *State v. Dooley*, 89 Iowa, 584, 57 N. W. 414; *State v. Taylor*, 118 Mo. 153, 24 S. W. 449; *State v. Pike*, 65 Me. 111; *State v. Wentworth*, 37 N. H. 196; *Leeper v. State*, 29 Tex. App. 63, 14 S. W. 398.)

Defendant and Cole entered into a conspiracy to commit a felony, namely, the "train robbery," and set forth to carry it out. While actually engaged in an attempt to carry out the conspiracy, defendant committed another felony—the robbery of Bell—which, as it transpired, was but a part of the main transaction. The evidence objected to was clearly admissible.

6. The state was permitted to introduce in evidence a letter, which we quote in full, in order to arrive at a clear understanding of the matter involved. It is as follows: "Tom: From what I see in the papers and from what I can hear, you are afraid I am trying to ditch you. Well, you can come out in the Prosecuting Attorney's office and see what I say. You or no

one else will go to the 'pen' on account of me, and I was told by six different people, including your own lawyer, that you had me arrested, but we will let that go. You will never have occasion to say that I ditched you or no one else. But it serves me right in one way; you told me to have nothing to do with that wind-jamming, notoriety-loving Hoosier, and I would not take your advice so now I have got to pay for it. [Signed] G. Joe Kirby."

The defendant objected to the introduction of this letter on the ground that it was not sufficiently identified, and was incompetent, irrelevant and immaterial. The witness Cole testified that he was familiar with defendant's handwriting, and, after examining the letter, said: "It looks like his handwriting, and that is his signature there. That is all I can say. The signature and the body of the letter are the same handwriting." The first objection, therefore, is not well taken. (*State v. Mahoney*, 24 Mont. 281, 61 Pac. 647.) However, so far as can be determined from the record, the letter bore no relevancy to the crime committed. It was also wholly immaterial, and this fact alone saves the action of the court from reversal. We cannot see how the defendant in any wise could have been injured by its admission in evidence. It did not tend to prove the defendant guilty of the crime for which he was on trial, nor of any other crime, in the slightest degree. The most that can be said is that it indicates that defendant was in the possession of evidence inimical to the interests of Tom. Defendant asserts that he will not disclose such information, which assertion, presumably, was intended to assure Tom that defendant's sense of honor was unimpaired, although it was reported that he had been wronged by Tom. Then, again, defendant did not attempt to controvert the state's evidence showing the robbery of Bell by him, and that testimony was clear and convincing. The only defense which defendant attempted was that of insanity, and it failed utterly. It is manifest that defendant was not injured by the introduction of the letter. Technically, the court's action was inexcusably erroneous. But error, in order to secure a reversal for defendant, must be prejudicial to him, and this

clearly was not. (*Lane v. Bailey*, 29 Mont. 548, 75 Pac. 191.)

7. The witness Conley, warden of the penitentiary, testified that he had known the defendant, Howard, at that institution, and, speaking of the defendant, said: "He was confined there for seven years and three months on a charge of robbery from Silver Bow county. Howard was released from the penitentiary on the 26th day of January, 1903." Thereupon, over defendant's objection, the court admitted in evidence a commitment in the case of the state of Montana against George Howard, which recites that the defendant therein named was convicted of robbery on October 26, 1895, in the district court of Silver Bow county.

The defendant argues that there was no proof of the authenticity of the commitment, and further that the defendant was not identified as the man to whom it refers. Upon the record, these objections are captious. Evidently the commitment offered was the original. At any rate, no objection was made to the effect that it was not. The court doubtless inspected it when the objection was made, and was satisfied as to its sufficiency. Conley identified the defendant as the one who had been confined in the penitentiary for robbery committed in Silver Bow county. The defendant was committed on October 26, 1895, and released January 26, 1903, which exactly corresponds with the requirement of the commitment. Other witnesses testified that they knew the defendant on trial while he was in the penitentiary. The proper way to prove the defendant's prior conviction was not by the introduction of the commitment, but by the record of the judgment. (Code of Civil Procedure, Sec. 3193.) But this was also done. The defendant therefore has no cause for complaint on this phase of the case.

8. The witness Furlong, on direct examination, testified that he had been confined in the penitentiary, and was at the time of the trial a prisoner in the county jail. He said he had known the defendant for about fifteen months, and had observed his demeanor at the penitentiary. From what he had

seen of the defendant, he thought the latter insane. On cross-examination, counsel for the state asked the witness a number of questions with the evident purpose of showing that Furlong was a member of the conspiracy "to rob the train." These questions were objected to as incompetent, irrelevant and immaterial, as well as being improper cross-examination. The court did not abuse its discretion in allowing these questions to be put to the witness, under the circumstances of the case. "The cross-examination would be of little value if the witness could not be fully interrogated as to his motives, bias and interest, or as to his conduct, as connected with the parties or the cause of action." (3 Jones on Evidence, Sec. 829.) The right of cross-examination extends not only to all facts stated by the witness in his original examination, but to all other facts connected with them, whether directly or indirectly, which tend to enlighten the jury upon the question in controversy, and this right should not be restricted unduly. (*Kipp v. Silverman*, 25 Mont. 296, 64 Pac. 884; *Cobban v. Hecklen*, 27 Mont. 245, 70 Pac. 805; *Hefferlin v. Karlman*, 30 Mont. 348, 76 Pac. 757; Code of Civil Procedure, Sec. 3376.) It is the duty of the trial court to exercise a sound legal discretion in controlling the cross-examination of a witness, and, if no abuse of discretion is shown, the appellate court will not interfere. (3 Jones on Evidence, Sec. 821.)

It is also insisted that the following question tended to degrade the witness: "You are in jail at the present time charged with holding up Swanson's saloon?" The witness answered in the affirmative. In the light of his previous testimony, we do not think the question tended to degrade him. On direct examination he had testified as to his confinement in the state prison, and that he was at the time of the trial confined in the jail. Nor, under the circumstances, was the allowance of the question prejudicial as not proper cross-examination. (*Matusevitz v. Hughes*, 26 Mont. 212, 66 Pac. 939, 68 Pac. 467.)

9. Defendant says the evidence is insufficient to sustain the conviction, for the reason that there is no evidence in the

record that the money taken was the property of Bell. The testimony discloses that defendant reached into Bell's pocket and took out the money after covering him with a revolver. The fact that the money was in Bell's possession is sufficient evidence of his ownership thereof to sustain the conviction. (*People v. Oldham*, 111 Cal. 648, 44 Pac. 312; *People v. Davis*, 97 Cal. 194, 31 Pac. 1109; *People v. Nelson*, 56 Cal. 77; *Bow v. People*, 160 Ill. 438, 43 N. E. 593; *State v. Hobgood*, 46 La. Ann. 855, 15 South. 406.)

10. The state did not offer any evidence to rebut that offered by defendant in support of his defense of insanity. The question as to whether the defendant had the criminal intent necessary to the commission of the crime was raised by his plea of not guilty. The question was one of fact. (*State v. Keerl*, 29 Mont. 508, 75 Pac. 362.) The jury heard all the evidence, and decided adversely to defendant's contention. Doubtless it acted within its province of considering the testimony on the question of insanity as of little or no weight. (Bishop's New Criminal Procedure, Secs. 669-673; *State v. Sullivan*, 9 Mont. 174, 22 Pac. 1088); and from the record, we do not think it acted unwisely.

The verdict was returned April 10, 1903. Three days later, when the defendant was brought into court to receive his sentence, his counsel asked that the question of the defendant's sanity be inquired into by a jury as required by law. The court denied the request, and the defendant assigns error.

Section 2521 of the Penal Code provides: "When an action is called for trial, or at any time during the trial, or when the defendant is brought up for judgment on conviction, if a doubt arises as to the sanity of the defendant, the court must order the question as to his sanity to be submitted to a jury, which must be drawn and selected as in other cases; and the trial or the pronouncing of the judgment must be suspended until the question is determined by their verdict." The doubt mentioned in the above section is one arising in the mind of the presiding judge, and much must be left to his judicial conscience. Unless

there be a doubt in the mind of the judge *a quo*—a doubt which he must legally determine as he would determine any other matter of grave import before him—he will not be warranted in calling a special jury to try the issue. Such is the purport of the authorities. (*State v. Peterson*, 24 Mont. 81, 60 Pac. 809, and cases cited; *People v. Hettick*, 126 Cal. 425, 58 Pac. 918; *People v. Geiger*, 116 Cal. 440, 48 Pac. 389.) In this case the judge heard all the testimony upon the trial, as well as observed the demeanor and appearance of the defendant during its progress, and, from what he heard and saw, entertained no doubt as to the defendant's sanity. The record, we think, bears out his conclusion as correct.

We have given diligent attention to all other assignments of error urged by defendant's counsel which are argued in his brief, but find none prejudicial to defendant. It follows that the judgment and order should be affirmed.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

MR. JUSTICE MILBURN, being absent at the time of the delivery of this opinion, takes no part therein.

Rehearing denied.

STATE EX REL. ANACONDA COPPER MINING COMPANY, RELATOR, v. CLANCY, JUDGE, ET AL.
RESPONDENTS.

(No. 2,043.)

(Submitted February 27, 1904. Decided June 22, 1904.)

States—Legislatures—Extra Session—Authority of Governor—Proclamation — Statutes — Validity — Uniformity—Judges — Eligibility—Disqualification — Prejudice—Constitutional Law—Due Process of Law—Delay of Justice.

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1. When convened in regular session, the power of the legislature to enact laws is plenary, except in so far as the Constitution has limited it.
2. When convened in extraordinary session, the power of the legislature is as absolute as when convened in regular session, except that it is then limited to enacting laws affecting those subjects only that are enumerated in the governor's call, or in his message.
3. In order to determine whether legislation passed at an extraordinary session of the legislature is germane to the subjects specified in the governor's proclamation, as required by Constitution, Article XI, Section 11, it is incumbent on the court to examine the proclamation as a whole, giving to the language used its ordinary meaning, and a rule of liberal interpretation should be applied, to the end that the legislation be operative.
4. A proclamation of the governor convened the legislature in extra session in December, 1903, for the purpose of enacting general legislation by which the bias and prejudice of district judges should be made a disqualification of such judges to try any case that may come before them, as well as legislation making suitable provision for the trial of such case or cases in such event. The legislature met and passed the Act of December 10, 1903, amending Code of Civil Procedure, Section 180, so as to provide that, on the filing of an affidavit of prejudice against a district judge, he should no longer act, and also amending Section 615, so as to provide that in such case, if a qualified judge should be called to try the cause within thirty days after such disqualification, no change of venue therefor should be had. *Held*, that such legislation was germane to the governor's call, as required by Constitution, Article VII, Section 11.
5. Act of December 10, 1903, amending Code of Civil Procedure, Section 180, so as to provide for the disqualification of a district judge by the mere filing of an affidavit of prejudice, is not in violation of Constitution, Article VIII, Section 16, providing the qualifications of district judges; such qualifications being limited to qualities necessary to render the person eligible to the office, without application to his qualifications to try particular cases.
6. Act of December 10, 1903, amending Code of Civil Procedure, Section 180, so as to provide for the disqualification of district judges on the filing of an affidavit of prejudice, thereupon disqualifying him to further act in the case except to arrange his calendar, notify another judge to try the case, or, if he fails to do so within thirty days, to change the place of trial, etc., and amending Section 615, so that, if another judge is called in within such time, the change of venue shall not be granted, does not contravene, but is in harmony with Constitution, Article VIII, Section 12, providing that any judge of the district court may hold court for any other district judge, and shall do so when required by law, since under the statute, both before and after its amendment, a judge can only be secured to preside for another on the invitation of a resident judge.
7. Act of December 10, 1903, amending Code of Civil Procedure, Section 180, providing for the disqualification of district judges on the filing of an affidavit of prejudice, is not in violation of Constitution, Article VIII, Section 11, conferring on district courts original jurisdiction in "all" cases in law and in equity, by reason of the fact that the filing of the affidavit, without a determination of the question of prejudice, deprives the judge of jurisdiction, since it is the imputation of prejudice, and not prejudice in fact, that constitutes the disqualification, which imputation is not subject to judicial investigation.
8. The legislature may deprive a court of discretion in the exercise of its jurisdiction.
9. Act of December 10, 1903, amending Code of Civil Procedure, Section 180, so as to provide for the disqualification of district judges on the filing of an affidavit of prejudice, is not in violation of Constitution of the United States, Amendment XIV, Section 1, nor Constitution of Montana, Article

III, Section 27, as depriving a litigant of his property without due process of law, in that no notice required to be given of the filing of the disqualifying affidavit, since, as the mere filing of the affidavit works the disqualification, the giving of notice would serve no purpose.

10. A litigant has no constitutional right to have his cause tried before a particular judge, hence a party is not deprived of life, liberty or property by the mere fact that he cannot have his cause tried before the judge of the district where the action was commenced.
11. Since the Act of December 10, 1903, amending Code of Civil Procedure, Section 180, so as to provide for the disqualification of district judges on the filing of an affidavit of prejudice, is general in its terms and operation throughout the state, and therefore sufficiently complies with Constitution, Article VIII, Section 26, requiring all laws relating to courts to have a uniform operation, it is immaterial that it was passed at an extra session of the legislature, called by the governor for the purpose of relieving an industrial condition existing in only three of the populous cities of the state.
12. Code of Civil Procedure, Section 180, as amended by Act of December 10, 1903, provides "that any justice, judge or justice of the peace must not sit or act as such in any action or proceeding when the other party makes and files an affidavit that he had reason to believe and does believe he cannot have a fair trial before a district judge by reason of the bias or prejudice of such judge." Held that, though such section as amended was defective in declaring that a "justice" of the supreme court or a justice of the peace should not act as such in any case in the district court, it would be assumed that the word "judge" in the first sentence referred to district judge, and the words "justice" and "justice of the peace" would be disregarded.
13. Code of Civil Procedure, Sections 180, 615, as amended by Act of December 10, 1903, providing for the disqualification of district judges on the filing of an affidavit of prejudice, and declaring that a change of venue shall not be granted for that reason if, within thirty days after the filing of the affidavit, another judge shall be called in to try the case, etc., does not authorize the disqualifying affidavit to be filed after the trial of the case has been begun, after which period no change of venue can be granted.
14. Code of Civil Procedure, Section 180, as amended by Act of December 10, 1903, provides for the disqualification of district judges by the filing of an affidavit of prejudice, upon the filing of which the judge is authorized to transfer the cause or call in another judge to try the same. Section 615 authorizes a change of venue where a judge is disqualified, and as amended by the same Act declares that if a judge is disqualified for prejudice, no change shall be granted if another judge is called in to try the cause within thirty days. Held, that such amendatory act was not in contravention of Constitution, Article III, Section 6, guarantying administration of justice without delay, in that it permits a party filing a disqualifying affidavit to prevent further action in case the disqualified judge will not call in another judge, since in that event the opposite party would at once be entitled to a change of venue under Section 615.
15. Act of December 10, 1903, amending Code of Civil Procedure, Section 180, authorizing each party to a suit to disqualify five district judges by filing an affidavit of prejudice, could not be held in contravention of Constitution, Article III, Section 6, guarantying the administration of justice without delay, though it authorizes the successive disqualification of two-thirds of the district judges in the state, in the absence of a showing that the "necessary" consequence of the enforcement of the act will be to deny litigants a speedy trial.
16. Before the court will declare solemn legislative enactments invalid, their unconstitutionality must be established beyond a reasonable doubt.

17. Courts cannot hold legislation invalid merely because it is unwise, or under it great wrongs may be perpetuated, or even because the measure itself is vicious.

APPLICATION by the state, on the relation of the Anaconda Copper Mining Company, for a writ of prohibition against the Second judicial district court and William Clancy, judge thereof. Writ granted.

Mr. A. J. Shores, Mr. C. F. Kelley, and Messrs. Forbis & Evans, for Relator.

Mr. John J. McHatton, Mr. T. J. Walsh, Mr. J. M. Denny, Messrs. Toole & Bach, and Mr. J. B. Roote, for Respondents.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On November 10, 1903, the governor of Montana issued his proclamation convening the Eighth legislative assembly in extraordinary session at the capital of the state on December 1, 1903. The purposes for which this assembly was convened are indicated in the preamble to the proclamation. After reciting the fact that a large number of petitions had been addressed to him, asking that the legislature be convened in extra session, the governor continues:

"Whereas, they (certain petitioners) further represent the desirability of general legislation by which the bias and prejudice of district judges be made a disqualification of such judges to try any case that may come before them or either of them, as well as legislation making suitable provision for the trial of such case or cases in such event: * * * Now, therefore, I, J. K. Toole, governor of the state of Montana, * * * do hereby and by virtue of the power and authority in me vested by the Constitution, convene the Eighth legislative assembly in extraordinary session, at Helena, Montana, the capital of said state, at 12 o'clock m., on December 1, A. D. 1903, for the purpose of considering the legislation hereinbefore referred to and taking such action thereon as it may deem wise or expedient."

Pursuant to this call the legislature met and passed two measures, which received the governor's approval and are now before us for consideration. The first of these is entitled "An Act to amend Section 615 of the Code of Civil Procedure." The other is entitled "An Act to amend Section 180 of the Code of Civil Procedure." The only material change made in Section 615 was to provide that: "If any qualified district judge shall be called in and shall within thirty days after the motion is made, appear and assume jurisdiction of the cause and of all matters and proceedings therein, no change of the place of trial shall be made." Section 180 was amended by adding thereto Subdivision 4, the portions of which material here read as follows: "(4) When either party makes and files an affidavit as hereinafter provided, that he has reason to believe, and does believe, he cannot have a fair and impartial hearing or trial before a district judge by reason of the bias or prejudice of such judge. * * * Upon the filing of the affidavit the judge as to whom said disqualification is averred, shall be without authority to act further in the action, motion or proceeding, but the provisions of this section do not apply to the arrangement of the calendar, the regulation of the order of business, the power of transferring the action or proceeding to some other court, nor to the power of calling in another district judge to sit and act in such action or proceeding. No more than five judges can be disqualified for bias or prejudice, in said action or proceeding, at the instance of the plaintiff, and no more than five at the instance of the defendant in said action or proceeding. * * *

Thereafter an action was pending, ready for trial, in department No. 2 of the district court of the Second judicial district of Montana, which action is entitled "*Anaconda Copper Mining Company, Plaintiff, versus Montana Ore Purchasing Company and Others, Defendants,*" and numbered 8,833 of the files and records of that court. This cause was set for trial for the 10th day of February, 1904. On February 5, 1904, the plaintiff, through its secretary and agent, made and filed an affidavit in

accordance with the provisions of Subdivision 4 of Section 180, as amended by the Act to which reference is made above. The filing of this affidavit was called to the attention of the court; but, notwithstanding this fact, the district judge presiding in the department in which the cause was set for trial, and against whom the affidavit of disqualification had been filed, announced his intention of proceeding with the trial. Thereupon an alternative writ of prohibition was issued from this court, directed to the district court and to the Honorable William Clancy, judge of department 2 thereof, requiring him to desist and refrain from any further proceedings in the cause until the further order of this court. This writ was made returnable, and the matter was argued and submitted in this court, on February 27, 1904. -

The two Acts above referred to are companion measures. The amendment to Section 615 is intended to carry into effect the provisions of Section 180 as amended. Numerous objections are lodged against the constitutionality of these Acts. However, no particular infirmity is pointed out respecting the Act amending Section 615. If the Act amending Section 180 is valid, it is quite clear that no constitutional objection can be urged against the other.

1. In the first instance it is contended that the legislation is not within the purview of the governor's call. Section 11, Article VII, of the Constitution provides: "He [the governor] may on extraordinary occasions convene the legislative assembly by proclamation, stating the purposes for which it is convened, but when so convened, it shall have no power to legislate on any subjects other than those specified in the proclamation, or which may be recommended by the governor." There is nothing contained in the governor's recommendations to the legislature, after it convened, in any manner qualifying the terms of the proclamation, so far as the particular measures under consideration are concerned.

It must be borne in mind that the governor is not a part of the lawmaking body. When convened in regular session, the

power of the legislature to enact laws is plenary, except in so far as the Constitution has limited it. (*State ex rel. Sam Toi v. French*, 17 Mont. 54, 41 Pac. 1078, 30 L. R. A. 415.)

The utmost extent of the governor's authority, so far as constructive legislative work is concerned, is to recommend such measures as he shall deem expedient (Section 10, Article VII, Constitution); but there is not any legal or moral obligation resting upon the members of the legislative assembly to follow such recommendations, if they deem them unwise or the measures indorsed inexpedient. When the exigencies of the times require it, the legislature may be called in extraordinary session by the governor to consider particular subjects of legislation. Those subjects must be enumerated in the proclamation or in the governor's message to the assembly, and the power of the legislature is limited to enacting laws affecting those subjects only. (Section 11, Art. VII, above.) In other words, the governor may submit the subjects with reference to which legislation is desired, but the lawmaking body then has absolute power to construct such laws respecting those subjects as it shall see fit (unless restrained by constitutional inhibition), or to disregard the subjects altogether and not enact any measures respecting them.

The governor has the same authority at a special session of the legislature that he has at a regular session—to recommend any particular measures which he may deem expedient; but such recommendation does not measure or limit the legislative authority. That authority is only limited by the scope of the subjects submitted for consideration, and any recommendation respecting a particular measure would not be binding upon the legislative assembly.

In order to determine whether a particular measure is germane to the subjects stated in the governor's proclamation, it is incumbent upon us to examine the proclamation as a whole (*Chicago, B. & Q. R. R. Co. v. Wolfe*, 61 Neb. 502, 86 N. W. 441), giving to the language used its ordinary meaning.

It is fairly deducible from an examination of the proclamation that the governor's purpose in calling the legislative assembly in extraordinary session was to secure, if possible, the enactment of some measure whereby a district judge, charged with entertaining bias and prejudice against a litigant, to such an extent as to engender the belief in the litigant's mind that he could not have a fair and impartial trial of his cause, should not be permitted to sit and hear the same. It was not the governor's purpose to advocate any particular measure, but, with this subject for consideration laid before the lawmaking power, to permit it freely to exercise its legislative discretion in framing any measure which might accomplish the result sought in calling the members together. To say that because, in his proclamation, the governor specified "general legislation by which the bias and prejudice of district judges be made a disqualification of such judges to try any case," etc., no law enacted in pursuance thereof would be valid which did not expressly declare bias and prejudice a disqualification, would be to lodge in the governor greater power than was ever contemplated by the constitutional provision under consideration. He cannot in advance tie the hands of the legislature. He cannot submit the draft of a proposed bill, and direct the legislature to enact it, or no measure at all; but any enactment which will meet the ends sought to be accomplished in his call must be deemed to be embraced within the limits of the subjects submitted for consideration. That a liberal rule for the interpretation of these proclamations has been generally applied, to the end that the legislation enacted in pursuance thereof be operative, is apparent from the adjudicated cases. *Chicago, B. & Q. R. R. Co. v. Wolfe*, above; *Baldwin v. State*, 21 Tex. App. 591, 3 S. W. 109; *In re Governor's Proclamation*, 19 Colo. 333, 35 Pac. 530; *Mitchell v. Turnpike Co.*, 22 Tenn. 456.

We are therefore of the opinion that the Act amending Section 180 above is within the purview of the governor's call, and, as the amendment to Section 615 is obviously intended to carry

Section 180 as amended into effect, by providing a means by which all cases in which a district judge is disqualified may be tried, this amendment to Section 615, then, is clearly comprehended within that portion of the proclamation quoted above, which reads: "Legislation making suitable provision for the trial of such case or cases in such event."

2. It is urged that the necessary effect of this Act amending Section 180, in providing for the disqualification of a judge by the mere filing of an affidavit, is to do by indirection what the legislature could not do directly—add to the qualifications prescribed for district judges by Section 16, Article VIII, of the Constitution. That section reads: "No person shall be eligible to the office of judge of the district court unless he be at least twenty-five years of age and a citizen of the United States, and shall have been admitted to practice law in the supreme court of the territory or state of Montana, nor unless he shall have resided in this state or territory at least one year next preceding his election."

It is elementary that the legislature cannot impose any additional conditions to those enumerated above as a prerequisite to any man's holding the office of district judge who might be elected or appointed to that office, and neither do we think that any effort in that direction was made by the enactment of the amendment to Section 180 above.

The qualifications enumerated in Section 16, Article VIII, above, have to do with the eligibility of a man to hold the office, but it does not follow that, because a district judge possesses these qualifications, he shall have a right, by virtue of his office, or otherwise, to try every cause which may be commenced in or transferred to his district. To say that he has such right is to say that he may try a cause to which he is a party plaintiff or defendant, and that his opposing litigant is helpless to prevent it. No such contention can be urged successfully.

The Constitution attempts to prescribe the qualifications without which a man ought not to hold the office of district judge. This Act does not attempt to add to or take from those

constitutional qualifications; in fact, it does not have anything to do with the right or eligibility of any one to hold or exercise the office, but provides the circumstances under which a particular judge, though possessing the qualifications necessary to hold the office, may not try a particular cause. The Act does not in any manner infringe the provisions of the Constitution referred to.

3. It is contended that this Act amending Section 180 violates that portion of Section 12, Article VIII, of the Constitution, which reads as follows: "Any judge of the district court may hold court for any other district judge, and shall do so when required by law." There is nothing whatever in the foregoing provision which would indicate an intention on the part of the framers of the Constitution to limit the method of securing the trial of a cause, in which the resident judge is disqualified, to calling in another judge. This provision is simply a means placed in the hands of the judges themselves to facilitate the dispatch of business in which they may be interested or otherwise disqualified from acting. There is no obligation resting upon a particular judge to call in another, and likewise no obligation resting upon an invited judge to accept the invitation. All that was decided in the *Weston Case*, 28 Mont. 207, 72 Pac. 512, respecting this matter, was that the only method by which one judge can be secured to preside for another is upon the invitation of the resident judge himself, and in this respect the provisions of Section 12, Article VIII, are prohibitory. There is nothing in the Act which impinges upon this provision. Under Section 180, as amended, a district judge may be disqualified by the filing of an affidavit provided for in Subdivision 4 thereof. His authority with reference to the particular matter then ceases, except that he may arrange his calendar, invite in another judge to try the cause for him, or, if he invites another judge, who fails to come within thirty days after a motion for a change of venue is made, he still retains authority to change the place of trial. While this constitutional provision lodges in a disqualified judge the sole

power to invite in another judge to try the case in which he is disqualified, it was never intended thereby to enable such disqualified judge, by refusing to call in another judge, or by delaying unreasonably his invitation, to deny altogether to a litigant a trial of his cause.

So that this Act, and Section 615 as amended, not only do not contravene the provisions of Section 12, Article VIII, above, but are subject to a construction in harmony with them. This is the conclusion reached by the Supreme Court of Florida with reference to a somewhat similar statute against which was lodged the same objection now under consideration. (*Thebaut v. Canova*, 11 Fla. 143.)

4. It is also urged that this Act amending Section 180 violates Section 11, Article VIII, of the Constitution, which confers on district courts "original jurisdiction in all cases at law and in equity," etc.

The particular objection made here is that the filing of the affidavit operates *ipso facto* to deprive the judge against whom it is aimed of authority to proceed with the trial of the cause, and that no provision is made at all for determining judicially whether, as a fact, the judge is actually biased or prejudiced, or, in other words, that this Act attempts to determine the question of bias and prejudice in advance, or permits the litigant to do so, whereas that can only be done by a judicial investigation and determination. But this proceeding to disqualify a judge is analogous to a proceeding for change of venue, and no one has yet denied the right of the legislature to provide for a change of venue upon such terms as it may propose. The authority to enact such statutes is not derived from the Constitution, but is inherent in the legislature, subject only to the constitutional provision that such laws shall not be local or special. In the absence of any constitutional inhibition, we know of no reason why the legislature might not provide for a change of venue merely upon demand of either party, without assigning any reason whatever. (4 Ency. Pl. and Pr. 431.) The mere fact that no provision is made for a judicial determination of

the bias or prejudice of the judge against whom the affidavit may be directed, is not itself sufficient to invalidate this Act.

As a matter of fact, it is not the bias or prejudice of the judge which disqualifies him, but the mere imputation of such bias and prejudice, and that leaves nothing to be judicially determined.

In considering this same objection to a similar statute, this court in *Godbe v. McCormick*, 1 Mont. 105, said: "So far as the [first] question is concerned, we do not regard the Act of the legislature as affecting the jurisdiction of the district court. It lays down a rule of procedure, in certain cases, for the observance of the courts in the exercise of their jurisdiction, of the same character as the laws regulating continuance, appeals, new trials, and the entire subject of remedies and of practice."

In this connection it is also said that the Act amending Section 615 seeks to take from the district court its discretion with reference to granting a change of venue and to impose a mere ministerial duty upon a judicial body. But it is not every question arising in court that is entitled to a judicial determination, or with reference to which judicial discretion need be exercised. In *Godbe v. McCormick*, above, the court said: "The mere fact that a law requires the performance by a court of a particular act upon a given state of fact is not a sufficient test by which to determine its invalidity, and in many instances the legislature may deprive the court of discretion in the exercise of its jurisdiction." To the same effect is the decision in *Smith v. Judge of the Twelfth District*, 17 Cal. 557, where it is said: "It is true that the court, having a discretion as to a particular matter, cannot, so long as it retains that discretion, be controlled in the exercise of it. But the whole error is in forgetting that the court has the discretion only by virtue of the law giving it, and that the same law can take away that discretion as to all matters of remedy, and leave to the court a simple ministerial duty." This doctrine is emphasized by numerous examples in our own practice, as well as elsewhere. A party to an action may amend his pleading once as a matter of

right—a right which the court cannot deny him, and respecting which it cannot exercise any discretion whatever. (Section 773, Code of Civil Procedure.) Each party to a civil action may, by a mere objection, peremptorily challenge four jurors (Section 1059, Code of Civil Procedure), and when these challenges are exercised the court has no discretion in the matter whatever. The jurors challenged may be thoroughly qualified to try the cause, and free from any interest, bias or prejudice, and the challenges may be interposed out of pique, wantonness, or a mere desire to hinder and delay the court, and yet no one can deny the right under our law, or say that the statute is invalid, because it does not require these challenges to be tried and determined by a court. In proceedings to transfer a cause from the state to the federal court on the ground of diverse citizenship, upon filing the requisite affidavit and bond, the state court has no discretion in the matter, but must make the transfer. These examples might be extended, but the foregoing suffice to illustrate the principle that with reference to many judicial proceedings there need not be judicial discretion exercised.

5. It is further contended that the Act amending Section 180 violates Section 1 of the Fourteenth Amendment to the Constitution of the United States, and Section 27, Article III, of the Constitution of Montana, in that no notice is required to be given of the filing of the disqualifying affidavit, and therefore the litigant is denied due process of law. But those constitutional provisions cannot be invoked here. That portion of Section 1 of the Fourteenth Amendment above, to which reference is made, reads as follows: "Nor shall any state deprive any person of life, liberty or property without due process of law." Section 27, Article III, above, reads: "No person shall be deprived of life, liberty or property without due process of law." It is hardly necessary to say that a party is not deprived of life, liberty or property by the mere fact that he cannot have his cause tried before a particular judge. The fact that the Constitution of Montana provides that "any judge of the dis-

strict court may hold court for any other district judge," and that liberal laws for change of venue are on the statute books of this state, sufficiently negatives the idea that a litigant has any right to have his cause tried before the judge of the district where the action was commenced; for, if he has such right, the venue could not be changed to another district, nor could a judge from another district ever preside at the trial of the same. There is a sufficient reason for the rule that notice should be given of most proceedings in course of litigation, but in this instance there can be none. No hearing is to be had upon the matter. The filing of the affidavit itself works the disqualification, and no purpose whatever could be served by giving notice. (*Livermore v. Brundage*, 64 Cal. 299, 30 Pac. 848.) When the reason for the rule ceases, so does the rule itself.

6. It is further said that the Act amending Section 180 is special legislation, and violates Section 26, Article VIII, of the Constitution, and that its terms are so uncertain and unintelligible as to render the Act void. The first of these contentions is based upon the theory that, as the governor in his proclamation referred to the industrial condition existing in three of the populous cities of the state, consequent upon the cessation of operations of certain large industries, and expressed his belief that work would be forthwith resumed in all such suspended operations if an extraordinary session of the legislature was convened to consider certain legislation, and as the extraordinary session did consider and pass this amendment to Section 180, it must result that the legislation was enacted for the express benefit of the people whose industries had been idle, entailing the industrial depression referred to by the governor. But, regardless of the circumstances under which the legislature was called in extraordinary session, or the motives which prompted this particular legislation, we are concerned only with the law itself, and if its terms are general and operate throughout the state, and affect all judges and litigants alike, it meets the constitutional requirements that "all laws relating to courts shall be general and of uniform operation throughout the state;

and the organization, jurisdiction, powers, proceedings and practice of all courts of the same class or grade, so far as regulated by law, shall be uniform." (Section 26, Article VIII, Constitution of Montana.) We need not, therefore, concern ourselves with the place of conception of this measure, or the history or circumstances surrounding its enactment.

Particular stress is laid upon its crudeness and inaccuracy. As amended, Section 180 now reads: "Section 180. Any justice, judge or justice of the peace must not sit or act as such in any action or proceeding * * * (4) when either party makes and files an affidavit as hereinafter provided, that he has reason to believe, and does believe, he cannot have a fair and impartial hearing or trial before a district judge by reason of the bias or prejudice of such judge. * * *". Of course, it was quite gratuitous for the legislature to say that a justice of the supreme court or a justice of the peace should not act as such in any case in the district court, if that is what the Act means. But we are of the opinion that, crude as the measure is, there is yet enough expressed to enable its terms to be carried into execution and to render it intelligible. We must assume that the word "judge," in the first sentence above, refers to district judge; and, if then we disregard the reference to the justices of this court and to justices of the peace, the measure is susceptible of intelligible construction. And while it may appear that we are approaching dangerously near legislation, when we give the interpretation indicated, still we think we have not trespassed on legislative functions in so doing, and prefer to give this construction to the measure in order that the legislative will may be carried out.

7. Does this Act violate Section 6, Article III, of the Constitution, which provides: "Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property or character; and that right and justice shall be administered without sale, denial or delay."

Whatever may be the infirmities of the Act, it is not open to the particular objection that it permits the disqualifying affi-

davit to be filed at any stage of the proceedings. While considered alone, Section 180 as amended would appear to be open to this objection, yet, as said before, these two measures must be construed together; for one is the counterpart of the other, and when this is done, and the terms of Section 180, as amended, limited as they must be, the objection is removed. In the first place, the disqualifying affidavit cannot be filed after the trial of the cause has been begun. This must be so necessarily, for after that stage in the progress of litigation has been reached there cannot be a change of venue. (4 Ency. Pl. and Pr. 426, and cases cited.) It was not intended by this Act to permit a judge to be disqualified in *any* event when a change of venue cannot be had upon the failure of a judge of another district to appear and assume jurisdiction. The very purpose of the amendment to Section 615 would be defeated if a disqualifying affidavit could be filed at any time after a trial had been begun; for that section, as amended, assumes to provide for the trial of all causes in which a judge has been disqualified under Subdivision 4 of Section 180, as amended, and, as we have already said, a change of venue cannot be had after a trial is commenced. It would be absurd to speak of a change of venue, or change of place of trial, after a trial has been had, and while a motion for a new trial, for instance, is pending.

Neither is the Act open to the objection that it permits a party, by filing a disqualifying affidavit, to prevent further action in the case in the event the district judge disqualified cannot or will not secure another judge to try it; for Section 615, as amended, may be taken advantage of by either party, and, if the plaintiff files the disqualifying affidavit, there is no reason why the defendant may not at once apply for a change of venue on the ground that the judge has been disqualified, and, if another judge does not appear within thirty days after such motion is made, the venue must be changed, and the cause then proceed.

It may be that the anomalous situation is presented of a party applying for a change of venue who does not want it, except as

an alternative of no trial at all, or an indefinite postponement of the day of trial while awaiting the coming of another judge; but this only illustrates an infirmity in the measure, which might with propriety be urged upon the lawmaking body, but which does not necessarily affect the validity of the Act.

Finally, it is contended that the necessary effect of the operations of this law will be to prevent the trial of cases altogether, or that such delay and inconvenience will result as will be tantamount to a denial of justice.

Whether either of these results will follow can only be determined from experience in the actual operations of the law itself. We cannot say that such would necessarily be the case, even if in every cause each side would avail itself of the utmost authority provided by the Act and disqualify successively five judges.

We are not aware that a like statutory provision has ever been the subject of construction by the courts of other states. Counsel have been unable to find any such decisions, and doubtless there are none. This dearth of decisions upon the question may be accounted for by the fact that, of the eleven states which have somewhat similar statutes, in ten of them only one change of judge is permitted, and in the other (Iowa) only two. The reasonableness of the measures adopted in those states has doubtless prevented any contests over them.

The possibility that one party even may disqualify five judges, and that successive changes of venue may be granted until the cause is removed for trial to a distant part of the state from the residence of the parties, and that a long time may elapse before a trial can be had at all, only illustrates an extreme case, where a great wrong would be perpetrated, and one's sense of justice is outraged by the infinite abuse of legal rights which may possibly follow the acknowledgment of the validity of such a measure; and yet this, also, is an argument which might with propriety be addressed to the legislative body, but not to a court, for we cannot hold legislation for naught merely because it is unwise, or under it great wrongs may be perpetuated, or even because the measure itself is vicious. The Act

may seem to stand out in striking contrast with similar statutes in Arizona, California, Colorado, Florida, Illinois, Indiana, Missouri, Oregon, Wisconsin and Wyoming, in each of which states the number of judges who may be disqualified is limited to one; but the fact that under this Act two-thirds of all the judges of the state may be disqualified in any one action does not necessarily render it void. By this we do not mean to say that there is no limit beyond which the legislature may not go. The Constitution has wisely provided that "courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property or character, and that right and justice shall be administered without sale, denial or delay;" and whenever it affirmatively appears that any measure has transgressed this provision, it will be held inoperative. But it must be shown that the *necessary* consequence of the enforcement of the Act will be to deny to litigants a speedy trial before we can say that the legislature exceeded its powers. Certainly, the extreme limits of legislative authority were reached in enacting this measure; but we cannot say that it appears conclusively that the operations of the law will result in a denial of justice.

After a consideration of the various objections urged against these measures, we are not prepared to say that their unconstitutionality is established beyond a reasonable doubt; and this is the criterion now recognized in this jurisdiction by which the invalidity of a solemn legislative declaration is to be determined. (*In re O'Brien*, 29 Mont. 530, 75 Pac. 196, and cases cited.) It is ordered that the peremptory writ issue as prayed for.

Writ granted.

STATE EX REL. DURAND, RELATOR, v. DISTRICT COURT
OF THE SECOND JUDICIAL DIS-
TRICT ET AL., RESPONDENTS.

(No. 2,053.)

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(Submitted February 27, 1904. Decided June 22, 1904.)

*Judges—Disqualification—Affidavit of Prejudice—Motions—
Statutes — Constitutionality—Application — Contempt—
Review—Prohibition.*

1. Act of December 10, 1903, amending Code of Civil Procedure, Section 180, making the filing of an affidavit of prejudice a ground of disqualification of a district judge, is not unconstitutional.
2. Act of December 10, 1903, amending Code of Civil Procedure, Section 180, making the filing of an affidavit of prejudice a ground of disqualification of a district judge, has no application to a motion to strike the answer of a defendant from the files, which was treated by both parties as a proceeding in contempt.
3. Act of December 10, 1903, amending Code of Civil Procedure, Section 180, makes the filing of an affidavit of prejudice disqualify the judge, hence a motion for a change of judge on that ground is improper.
4. An order denying a motion for a change of venue can be reviewed only on appeal from final judgment, and not on an application for a writ of prohibition.

APPLICATION by the state, on the relation of Millie Durand, for a writ of prohibition against the Second judicial district court for Silver Bow county, Montana, and Hon. E. W. Harney, judge thereof. Dismissed.

Messrs. McBride & McBride, for Relator.

Mr. John J. McHatton, Mr. J. M. Denny, and Mr. George F. Shelton, for Respondents.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On January 15, 1904, Fay A. Durand commenced an action in the district court of Silver Bow county against Millie Du-

rand, Oscar Durand, the Equitable Life Assurance Society, F. T. McBride and Robert McBride. The defendants Millie Durand and F. T. and Robert McBride appeared and answered on January 22d. On the same day defendant Robert McBride, for himself and for Millie Durand and F. T. McBride, filed an affidavit disqualifying Hon. E. W. Harney, judge of the department in which said action was pending, and incorporated in his affidavit of disqualification a motion for change of venue, or, in lieu thereof, a change of judge. This affidavit of disqualification was made pursuant to the provisions of Section 180 of the Code of Civil Procedure, as amended by the second extraordinary session of the Eighth legislative assembly. On January 29, 1904, the plaintiff had the deposition of defendant Millie Durand taken before a notary public, and on the taking of such deposition Millie Durand was asked to attach to and make a part of her deposition a certain insurance policy and a certain assignment in writing which she had in her possession. This request she refused to comply with, and her deposition showing such refusal was filed in the court, the matter called to the attention of the court, and the plaintiff thereupon moved to strike from the files the separate answer of Millie Durand, for the reason that she had so refused to answer proper and pertinent questions asked in taking her deposition. On February 13, 1904, Robert McBride again filed a disqualifying affidavit, similar to the one filed January 22d. On February 13th the district court, over the objection of counsel for the answering defendants, set the motion to strike the answer of Millie Durand from the files, and the motion of the answering defendants for change of venue or change of judge, for hearing on February 15th. On February 15th the motion for change of venue or change of judge was denied, and the hearing on the motion to strike from the files the answer of Millie Durand was continued until February 18th. On February 17th, on the application of Millie Durand, this court issued an alternative writ of prohibition, enjoining the district court and Hon. E. W. Harney, judge thereof, from further proceeding in the hearing

of said motion of the plaintiff to strike from the files the answer of Millie Durand, or otherwise proceeding in said action, except to arrange the calendar, call in another district judge to try the cause, or change the venue. This writ was made returnable, and the matter was heard and submitted, on February 27, 1904.

In this court it is contended, on behalf of respondent, first, that the Act of the second extraordinary session of the Eighth legislative assembly, approved December 10, 1903, amending Section 180 of the Code of Civil Procedure, which authorizes the filing of a disqualifying affidavit such as was filed in the district court in this instance by the defendant Robert McBride, is unconstitutional; second, that the proceeding sought to be restrained by the writ of prohibition is one in contempt, and that the Act above mentioned, even if valid, has no application to such proceeding; and, third, that the district court properly denied the motion for change of venue or change of judge, for the reason that all of the defendants did not unite in the motion.

1. The first of these contentions is disposed of by the decision in *State ex rel. Anaconda Copper Mining Company v. District Court*, 77 Pac. 312, this day decided.

2. Both parties in this court have treated the motion to strike the answer of defendant Millie Durand from the files as a proceeding in contempt, and on the authority of *State ex rel. Boston & Montana Con. C. & S. Mining Company v. District Court*, 76 Pac. 10, the Act amending Section 180 above is held to have no application to such proceeding.

3. It is not contemplated by either Section 180 above, as amended, or Section 615 of the same Code, as amended, that a motion for a change of judge shall be made, and such motion, if made, is of no effect, and could properly be disregarded altogether. Upon the filing of the affidavit by defendant McBride, the judge against whom such affidavit was directed was thereupon deprived of any authority to proceed further in the case of *Fay A. Durand v. Millie Durand et al.*, except to arrange

the calendar, call in another judge, or change the venue. Such disqualification of the judge is made a ground of motion for change of venue under the provisions of Section 615 above, as amended; and, unless another judge appears and assumes jurisdiction of the cause within thirty days after the motion for change of venue is made, the venue must be changed. We therefore disregard the motion for change of judge, as not provided for by the statute. So far as the action of the court in overruling the motion for change of venue is concerned, that cannot be considered on this application for a writ of prohibition. It can be reviewed only on appeal from the final judgment.

As the relief sought here is to prevent the respondent judge from hearing the contempt proceedings, and as the Act amending Section 180 above has no application to proceedings in contempt, it is ordered that the alternative writ of prohibition heretofore issued be quashed, and these proceedings dismissed.

Dismissed.

Rehearing denied July 9, 1904.

WESTERN IRON WORKS, RESPONDENT, v. MONTANA
PULP & PAPER COMPANY ET AL., DE-
FENDANTS; UNION BANK & TRUST
COMPANY, APPELLANT.

(No. 1,901.)

(Submitted May 26, 1904. Decided June 22, 1904.)

Mechanics' Liens—Notice — Description of Property—Sufficiency—Continuing Account — Mortgages — Priority—Corporations—Incorporation — Evidence—Certificate — Certified Copies.

1. The organization of a corporation under the state law was properly proved by a copy of its certificate of incorporation, certified by the secretary of state, under Code of Civil Procedure, Section 3207.
2. The "property" to be identified under Section 2131, Code of Civil Procedure, is the building or improvement on which the lien is given, and hence a specific description of the "land" is not required.
3. Where, in proceedings to foreclose a mechanic's lien, the record disclosed that the building sought to be charged was monumental in character, easily distinguishable, and known as the paper mill of a particular corporation, and that no other mill or building of like character or description existed in the town, a notice of lien describing the property as "that certain two-story brick mill building, etc., with the lot or lots on which the same is situated, comprising portions of the following," including a general description of certain blocks in the townsite of such town and certain real estate outside the same, was sufficient.
4. Where a notice of a mechanic's lien, after describing the building on which the lien was claimed, added a description of land, in addition to that covered by the building, largely in excess of the statutory amount on which the lien might be foreclosed, such defect was not fatal to the lien; the amount to which the claimant was entitled being subject to adjudication in the proceedings for the enforcement of the lien.
5. In proceedings to foreclose a mechanic's lien, the question whether the materials were furnished and the labor was performed under one general contract, or under separate contracts, is one of fact.
6. In a proceeding to foreclose a mechanic's lien, evidence reviewed, and held to sustain a finding that the materials and labor were furnished under a single contract on an open, continuous account.
7. Where a mortgage was executed subsequent to the furnishing of materials and labor, for which a lien was claimed on the mortgaged property, the mortgagee, by purchase of the property on foreclosure of the mortgage, did not become a *bona fide* purchaser, but was substituted only to the rights of the mortgagor, and took the property subject to the mechanic's lien, under Code of Civil Procedure, Section 2133.

Appeal from District Court, Gallatin County; Wm. L. Holloway, Judge.

ACTION by the Western Iron Works against the Montana Pulp & Paper Company and others. From a judgment in favor of plaintiff, and from an order overruling a motion for a new trial, defendant Union Bank & Trust Company appeals. Affirmed.

Mr. Eugene B. Hoffman, and Messrs. McBride & McBride, for Appellant.

Mr. George A. Clark, and Mr. J. K. Macdonald, for Respondent.

MR. COMMISSIONER CLAYBERG prepared the following opinion for the court.

Appeal by the Union Bank & Trust Company from a judgment rendered against it and from an order overruling its motion for a new trial.

The Western Iron Works (hereinafter designated as the "Iron Works") filed a complaint in the district court of Gallatin county against the Montana Pulp & Paper Company (hereinafter designated as the "Paper Company"), the Union Bank & Trust Company (hereinafter designated as the "Trust Company") and the Davis & Weimescary Company, for the purpose of establishing and foreclosing a mechanic's lien upon certain real estate alleged to belong to the Paper Company. The Trust Company was made a party defendant, because it held a mortgage upon the property against which the lien was claimed. The Davis & Weimescary Company was made a party defendant, because it also claimed a mechanic's lien on the same property.

The property against which the lien is claimed is described in the notice of lien as follows: "That certain two-story brick mill building, with all machinery, engines and boilers contained therein, and appurtenances, with the lot or lots upon which the same is situated, comprising portions of the following: Fractional blocks Nos. 24, 25 and 41 of the original town of Manhattan, according to the plat of said town on file in the office of the clerk and recorder of Gallatin county, Montana, and all right and title of said Montana Pulp & Paper Company to Manhattan avenue, between blocks 25 and 41 and First street, and between blocks 24 and 25 and the west half of Second street, and between blocks 25 and 26 and blocks 40 and 41 of said townsite; a tract of land in the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Sec. 3, T. 1 N., R. 3 E., said Gallatin county, beginning at a stone monument, the quarter corner Secs. 3 and 10, of said township and range, running thence at magnetic variation of 19 deg. 42 min. E., north 572 and 85-100 feet, to the northeast corner of fractional block 41 of Manhattan townsite, thence

west on the section line 756 and 61-100 feet, to the place of beginning, all in said Gallatin county, state of Montana."

The complaint alleges: "That the following is a correct description of the property upon which said work and labor was performed, and materials, machinery and fixtures furnished, to-wit: Block numbered twenty-five (25), in the town of Manhattan, with the improvements thereon."

The judgment describes the property against which the lien is adjudged as follows: "That certain paper mill building, with lots numbered two, three, four, nineteen, twenty, twenty-one and twenty-two, of block twenty-five, Manhattan townsite, Gallatin county, Montana, upon which the same is situated, being the property of defendant Montana Pulp & Paper Company."

The Trust Company filed its separate answer to the complaint, wherein it denied that the Iron Works furnished any materials or fixtures, or performed any labor, "for or upon any of the property described in its complaint, upon an open or continuous account." "Denies that block numbered twenty-five (25) of the town of Manhattan, with the improvements thereon, is a correct or true description of any property for which plaintiff furnished any material or upon which plaintiff performed any work or labor." "Denies that on the 15th day of September, 1900, or at any time, or at all, the plaintiff filed in the office of the county clerk and recorder of Gallatin county, Montana, a just or true account of the amount due or owing to the plaintiff for materials furnished or labor performed upon any property described in its said amended complaint, after allowing all credits, or containing a true or correct description of any property permitted by law to be included within a notice or claim of lien, or upon which plaintiff was entitled to or could enforce a claim of lien, as against this defendant." "Denies that any alleged notice or claim of lien filed by the said plaintiff with the clerk and recorder of Gallatin county, Montana, contained a correct description of any property described in plaintiff's amended complaint, and now sought to be charged with said alleged lien, and denies that the said plaintiff,

at any time mentioned in its said amended complaint, or at all, filed any other or different notice or claim of lien than the so-called notice and claim of lien hereinafter referred to, and a copy of which is hereto annexed, marked 'Exhibit A,' and made a part of this answer." As an affirmative defense it alleges, in substance, that on May 1, 1900, the Paper Company executed to it a mortgage to secure the payment of \$60,000, covering all the property described in the Iron Works' notice of lien; that on January 21, 1901, a default having occurred in the terms and conditions of the mortgage, the Trust Company commenced a suit for the foreclosure thereof, which resulted in a decree in its favor in February, 1901; that a sale of the property was had under this decree on March 15, 1901, at which time the Trust Company became the purchaser of the property. The Iron Works was not made a party to this suit for foreclosure, although its notice of lien had been filed long before the institution of that suit. The answer then alleges that the lien claimed is subject to the Trust Company's mortgage and title.

To this answer the Iron Works replied, denying all new matter. Separate answers were also filed by the Paper Company and by the Davis & Weimescary Company, to which replies were made; but the issues raised by these other answers are not material in this case, because the court below rendered a decree in favor of the Iron Works, and none of the parties to the suit below appealed except the Trust Company.

The decision of the four following questions discussed in the brief are determinative of these appeals, and we shall not further refer to the assignments of error: (1) As to the proof of the corporate existence of the Western Iron Works. (2) As to the sufficiency of the notice of the claim of lien with reference to the description of the property therein. (3) As to the character of the account upon which the claim of lien is based. (4) As to the lien being subject to the rights of the Trust Company.

1. As to the corporate character of plaintiff: The record discloses that the Trust Company denied the allegation of the corporate existence of the Iron Works. Upon the trial of the

case the Iron Works offered in evidence a copy of its certificate of incorporation, duly certified by the secretary of state. This was objected to as irrelevant, immaterial and incompetent. The Iron Works was organized as a corporation under the law of 1887. Upon the organization of the state of Montana the secretary of state succeeded to the office of secretary of the territory, and became the legal keeper of all the records of that office. The certificate of incorporation of the Iron Works being of record in that office, it was properly proved by a copy thereof certified by the secretary of state. (Section 3207, Code of Civil Procedure.)

2. As to the sufficiency of the notice or claim of lien: An investigation of the record discloses the fact that, in the notice or claim of lien, the land upon which the buildings are situated is described very generally, that in the amended complaint it is more specifically described, and in the judgment of the court such description becomes accurate. Appellant claims that the description of the land sought to be subjected to the lien must be definite and certain in the notice or claim of lien; that the land described therein comprises "approximately eighteen acres, containing practically all the ground in the town of Manhattan, and practically all the ground described by metes and bounds outside the town of Manhattan," and that the lien law gives a lien upon only one acre of ground if outside the city, or upon land or lots upon which the building is situated if within the city. It is therefore contended that the description in the notice of lien is not sufficient to support any mechanic's lien upon any property therein mentioned.

It will be noticed that the particular property upon which the lien is claimed is described in the notice of lien as follows: "That certain two-story brick mill building, with all machinery, engines and boilers contained therein, and appurtenances, with the lot or lots upon which the same is situated, comprising portions of the following." Then follows a general description of certain blocks in the townsite of Manhattan and certain real estate outside said townsite.

Section 2131 of the Code of Civil Procedure provides that every one, wishing to avail himself of the benefits of the chapter upon mechanics' liens, must file with the county clerk of the county in which the premises mentioned are situated, and within ninety days after the material or machinery aforesaid has been furnished or the work or labor performed, a true account of the amount due him after allowing all credits, and containing a correct description of the property to be charged with said lien, verified by affidavit; "but any error or mistake in the amount or description does not affect the validity of the lien if the property can be identified by the description."

The purpose of describing the *land* upon which the building or improvements are situated "is demanded only for purposes of identification." (*Brunner v. Marks*, 98 Cal. 374, 33 Pac. 265; *North Star Iron Works v. Strong*, 33 Minn. 1, 21 N. W. 740; *Drexel v. Richards*, 50 Neb. 509, 70 N. W. 23; *Taylor v. Netherwood*, 91 Va. 88, 20 S. E. 888.)

Any description which will enable one familiar with the locality to identify the property upon which the lien is claimed is sufficient. (*Hooven, etc. Co. v. Featherstone*, 111 Fed. 81; *McNamee v. Rauck*, 128 Ind. 59, 27 N. E. 423; *Hughes v. Torgerson*, 96 Ala. 346, 11 South. 209, 16 L. R. A. 600, 38 Am. St. Rep. 105.)

By Section 2130 of the Code of Civil Procedure, a lien is given upon the *building* or *improvement*, in the construction of which the labor or materials were used, and Section 2133 of the Code of Civil Procedure *extends* this lien to the *land* upon which the structure or building is situated. Therefore the "*property*" to be identified under Section 2131 of the Code of Civil Procedure is the building or improvement upon which the lien is given.

The notice of lien in this case describes this property as "that certain two-story brick mill building, * * * with the lot or lots upon which the same is situated," in the town of Manhattan, Gallatin county, Montana. If the description in the notice of lien ended here, it would, under the above decisions,

have answered the purpose required by the statutes. It would be ample to identify the property upon which the lien is claimed. The record discloses that the building is about 300 feet long, 150 feet wide, and 50 feet high, and "is monumental in character, is easily distinguishable as, and is known to be, the paper mill of the Montana Pulp & Paper Company," as the court below aptly said. The record does not disclose that any other mill or building of like character or description exists in the town of Manhattan, but, on the contrary, does disclose that there are no other two-story brick buildings in that vicinity. The appellant introduced no testimony upon the hearing in the court below, except its mortgage, the judgment roll foreclosing the same, and the sheriff's deed of the property to itself upon such foreclosure.

The appellant insists that the remainder of the description of the land set forth in the notice of lien discloses that the land claimed by the lien exceeds the amount allowed by statute, and therefore the description is so indefinite as to avoid the lien claimed. We are of the opinion that this position is unsound. The purpose of the filing of a claim of lien is to notify all parties dealing with the property that a lien is claimed upon it. When the building is identified this notice is given. All persons are charged with the knowledge that the statute gives a lien upon a building, and then extends it to a certain area of the land upon which the building is situated. If the lien claimant were required to specifically describe the land in his notice of lien, he would often, without any fault on his part, be unable to do so. To ascertain the exact description, if outside the limits of a city, would in many instances require a survey, which the owner might object to and prevent. Again, such a requirement, where the structure is outside the limits of a city, would give the right to the lien claimant to select the land in any shape he desired, and the query would then arise whether his selection would not be binding upon the court and all parties to the suit. This might render the statute extremely oppressive upon the landowner. If there was more than one lien claimant, each

might select the ground desired by him, and no two selections might coincide.

If the tract of land described is of greater area than the statute allows, but is sufficient for identification, the amount and specific description against which the lien should be adjudged is a matter to be tried and determined by the court; and, as held in the case of *Oster v. Rabeneau*, 46 Mo. 595, the court may, if necessary, appoint a surveyor or commissioner "to make it certain and exact in every respect prior to the judgment of the court." This, we believe, is the safer rule, and the one supported by the weight of authority. (*Smith v. Sherman Min. Co.*, 12 Mont. 524, 31 Pac. 72; *North Star Iron Works v. Strong*, 33 Minn. 1, 21 N. W. 740; *Evans v. Sanford*, 65 Minn. 271, 68 N. W. 21; *Drexel v. Richards*, 50 Neb. 509, 70 N. W. 23; *White Lake Lumber Co. v. Russell*, 22 Neb. 126, 34 N. W. 104, 3 Am. St. Rep. 262; *Edwards v. Derrickson*, 28 N. J. Law, 39; *Derrickson v. Edwards*, 29 N. J. Law, 468, 80 Am. Dec. 220; *Shattuck v. Beardsley*, 46 Conn. 386; *Whitenack v. Noe*, 11 N. J. Eq. 321; *Oster v. Rabeneau*, 46 Mo. 595; *Bradish v. James*, 83 Mo. 313; *Willamette Steam Mills Co. v. Kremer*, 94 Cal. 209, 29 Pac. 633.)

In so far as the granting of the lien is concerned, the statute is remedial in character, and should be liberally construed. In so far, however, as the procedure is concerned by which the lien is claimed and enforced, being pointed out by the statute, such statute must be strictly followed. (*McGlaufflin v. Wormser*, 28 Mont. 177, 72 Pac. 428.) The Supreme Court of Missouri has well said: "The courts at one time were inclined to hold that enactments for mechanics' liens were in derogation of the common law, and their provisions should therefore be construed strictly against those who sought to avail themselves of their benefits. But the better doctrine now is that these statutes are highly remedial in their nature, and should receive a liberal construction to advance the just and beneficent objects had in view in their passage. Their great aim and purpose is to do substantial justice between the parties, and this should never be

lost sight of in giving them a practical construction." (*De Witt v. Smith*, 63 Mo. 263.)

The case under consideration is so clearly distinguishable from that of *Big Blackfoot Milling Co. v. Blue Bird Mining Co.*, 19 Mont. 454, 48 Pac. 778, that further comment seems unnecessary.

We are therefore of the opinion that the notice, in so far as the description of the property is concerned, complies with the statute.

3. As to the account: Appellant claims that the account upon which the lien is based "is not a continuous running account; but, on the contrary, the evidence of plaintiff shows affirmatively and conclusively that any material furnished or labor performed was furnished and performed under separate contracts, payments for which were to be due at the end of each month." The question as to whether the materials furnished and labor performed were under one general contract, or under separate contracts, was one of fact. (*Treusch v. Shryock*, 51 Md. 162; *Lamb v. Hanneman*, 40 Iowa, 41.)

Appellant introduced no evidence as to this question, and therefore its determination must rest entirely upon plaintiff's evidence. The court below, after hearing all the evidence, made the following finding: "That between the 27th day of March, 1900, and the 22d day of June, 1900, the plaintiff furnished materials, machinery and fixtures upon an open and continuous account to the defendant Montana Pulp & Paper Company at its special instance and request." The evidence disclosed in the record fully sustains this finding.

Witness Hoyt testified that "in the first place Mr. Kennedy [manager of the Paper Company] inquired of me personally in regard to prices for materials that he would need in the specifications and construction of the Montana Pulp & Paper Company mill at Manhattan; inquired for prices on labor and prices on materials, such as shafting, pulleys, and prices on labor for blacksmith. * * * This conversation * * * was some time in March, 1900. * * * Mr. Kennedy came

to the office, and met me personally, and asked for these prices, stated who he was, and asked for these prices, and stated at that time there was quite an amount of machinery that was necessary over there, and wanted to know what our facilities were for getting this work out, and I told him we could furnish anything he wanted in our line, and he inquired for our price, and I quoted the prices, and he seemed to think they were high, but, in view of the fact that we could get the work out immediately, that he would let this work and send us an order within a very few days, and additional orders to fill right along. He gave me to believe at that time there was a vast amount of work, and therefore I quoted him quite low prices. * * * There was no understanding in the conversation which I had with Mr. Kennedy as to when the delivery of the goods should cease, nor any understanding as to when the goods should be paid for." The record then discloses the correspondence between the parties, ordering the materials mentioned in the account filed with the notice of lien at different times.

Witness Melcher testified that "Mr. Kennedy called on me that morning relative to the work that we were getting out for the Montana Pulp & Paper Company, more particularly I thought, that morning, to urge the prompt delivery of anything he would want; also to have me promise that any and all things which he would order in the future would be attended to very promptly. That was the principal object of his visit there that morning. He didn't give me any further understanding as to what would be ordered in the future, any more than that there would be thousands of dollars' worth of work required. * *

* I was familiar at all times with what was going on at this plant and what was to be the use of it. He gave me to understand what he would want. I knew in a general way what orders would come to me, what would be required to furnish for the building. * * * I was given to understand that they were constructing a pulp and paper mill there, and they would want materials, finished and unfinished materials, at the completion of that mill, which we had the facilities for furnishing.

There was no definite amount stated, nor order made for a certain amount or quantity. Each letter would specify what they wanted at that time. The general proposition didn't specify anything, and there was nothing said about the length of time these orders would continue."

We are satisfied that this testimony is sufficient to support this finding under the following authorities: *Helena Steam Heating & Supply Co. v. Wells*, 16 Mont. 65, 40 Pac. 78; *Matthews v. Waggenhaeuser Brewing Ass'n*, 83 Texas, 604, 19 S. W. 150; *Kizer Lumber Co. v. Mosely*, 56 Ark. 544, 20 S. W. 409; *Trustees v. Heise*, 44 Md. 453; *Gray v. Elbling*, 35 Neb. 278, 53 N. W. 68.

The facts of this case are clearly distinguishable from those in *A. M. Holter Hardware Co. v. Ontario Min. Co.*, 24 Mont. 184, 61 Pac. 3; and come clearly within the rule announced in the case of *Helena Steam Heating & Supply Co. v. Wells*, *supra*.

4. As to the question of priority: Counsel for appellant claims that the Trust Company was a *bona fide* purchaser of the property against which the lien is claimed, was misled by the indefinite description in the notice of lien, and that the lien claimed by the Iron Works is subordinate to its claim. The Trust Company became a mortgagee under the mortgage dated May, 1900, which was subsequent to the furnishing of considerable of the material for which the lien is claimed. It foreclosed its mortgage and became the purchaser of the property at the sheriff's sale under the decree of foreclosure. By this procedure it simply became substituted to only the rights, titles and interest that the Paper Company had in the property upon which the lien is claimed, and to no other or greater rights. It simply stood in the shoes of the Paper Company, and was, therefore, not a *bona fide* purchaser, but was the successor in interest of the Paper Company. It did not allege nor show that it was in fact misled in any way by the description in the notice of lien, but contented itself by simply proving its source of title. Being merely the successor in interest of the Paper Company, it is bound to the same extent and in the same manner as that com-

pany. Under the provisions of Section 2133, Code of Civil Procedure, appellant's mortgage was subject to the Iron Works' lien.

We therefore advise that the judgment and order appealed from be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order are affirmed.

MR. JUSTICE HOLLOWAY, being disqualified, takes no part in this decision.

TRAPHAGEN ET AL., APPELLANTS, v. KIRK, RESPONDENT.

(No. 1,910.)

(Submitted May 31, 1904. Decided June 22, 1904.)

Mining Claims—Public Land—Railroad Grants—Character of Land—Conclusiveness—Contract of Sale—Consideration—Adequacy—Specific Performance.

1. Under Act of Congress February 26, 1895, Chap. 136, Section 7, 28 Stat. 683, providing that no patent or other conveyance of title shall be delivered to the Northern Pacific Railroad Company for any lands in Montana and Idaho, under the congressional grant to such railroad, until the lands shall have been examined and classified as non-mineral by mineral land commissioners provided for, a patent to such railroad company for land classified by such commissioners as non-mineral is conclusive as to the character of the land, in the absence of fraud, imposition or mistake.
2. In order to make a valid mining location under Rev. St. U. S. Section 2319, providing that all mineral deposits in mineral lands belonging to the United States, and the lands containing the same, shall be open to entry, etc., surface ground, including the vein or lode, must be appropriated, and such surface ground must be the property of the United States.
3. Where an entire section of public land had been patented by the government to the Northern Pacific Railroad Company, which had conveyed the same to defendant, an entry thereon by complainants for the purpose of making a mining location without defendant's consent was a trespass on defendant's rights, and was therefore ineffectual for the purpose of initiating a valid mining claim.

4. Where complainants' entry on defendant's land for the purpose of locating a mining claim was wholly ineffectual as against defendant for that purpose, a contract by which complainants agreed to transfer to defendant an undivided one-third interest in the lead or lode, in consideration of defendant's transfer to plaintiffs of an undivided two-thirds interest therein, together with the necessary amount of real estate covered by the location, etc., in settlement of the rights of the parties without litigation, was not based on a sufficient consideration to support a suit for specific performance under Civil Code, Section 4417, providing that specific performance cannot be enforced against a person unless he has received an "adequate" consideration for the contract.

Appeal from District Court, Gallatin County; Wm. L. Holloway, Judge.

BILL by F. W. Traphagen and another against Thomas Kirk. From a decree in favor of defendant, plaintiffs appeal. Affirmed.

Messrs. Hartman & Hartman, for Appellants.

It was not necessary for the plaintiff to allege that it had no remedy at law, it being presumed that it could not obtain adequate relief in pecuniary compensation and the contract being one which either of the parties could have compelled the other to perform. (*Ide v. Leiser*, 10 Mont. 5 on p. 15; Civil Code, Secs. 4413, 4412, 4411 and 4410.)

It was not necessary to state that the contract sued on was in writing, or to set out the writing in the complaint, that being a matter of proof and not of allegation. (Bliss, Code Pleading, 3d Ed., Secs. 312, 354; *Sweetland v. Barnett*, 4 Mont. 217.)

It is a matter of common knowledge that the Act of Congress of July 2, 1864, Chap. 217, 13 U. S. Stat. at page 365, whereby the original grant of the land in question was made to the Northern Pacific Railroad Company, and its amendatory acts, specially reserves from the operation of the grant all minerals found in the land thereby granted. And this is true whether the mineral was known or unknown at the time the grant became operative. (*Barden v. Northern Pac. R. R.*, 154 U. S. 208; *Northern Pac. Ry. Co. v. Soderberg*, 188 U. S. 526;

Northern Pac. R. R. Co. v. Sanders, 166 U. S. 620; *Adams v. Henderson*, 168 U. S. 581.)

A compromise of doubtful and conflicting claims is a sufficient consideration for a promise voluntarily made not induced by fraud, though the claims were illegal or without foundation. (*Mason v. Wilson*, 43 Ark. 172; *Castle v. Ross*, 33 Ill. 245; *Honeyman v. Jarvis*, 79 Ill. 318; *Knotts v. Preble*, 50 Ill. 226; *Taylor v. Patrick*, 4 Ky. 168; *Grandin v. Grandin*, 49 N. J. Law, 508, 60 Am. Rep. 642; *White v. Hoyt*, 73 N. Y. 505.)

A compromise of doubtful claims is always a sufficient consideration to uphold the contract made on such compromise. (*Allen v. Prater*, 30 Ala. 458; *Bozeman v. Rushing*, 51 Ala. 329; *Finley v. Funk*, 35 Kan. 668; *O'Keson v. Barclay*, 2 Pen. & W. 531; *Logan v. Matthews*, 6 Pa. St. 417; *Williams v. Poppleton*, 3 Ore. 139; *Knowles v. Knowles*, 21 N. E. Rep. 196.)

Mutual and concurrent promises afford sufficient legal consideration for the support of each other. (*Funk v. Hough*, 29 Ill. 145; *Boise v. Vincent*, 24 Iowa, 387; *Babcock v. Wilson*, 17 Me. 372; *Whitehead v. Potter*, 26 N. Car. 257; *Nott v. Johnson*, 7 Ohio St. 270; *Bank v. Sabin*, 48 Vt. 239; *Hutt v. Hickey* (N. H.), 28 Atl. 456; *Breslin v. Brown*, 24 Ohio St. 565; *Morris v. Lagerfelt*, 103 Ala. 608; *Wilson v. Samuels*, 100 Cal. 514; *Fulton v. Smith*, 27 Ga. 413; *Humphrey v. Haskell*, 4 Allen, 497; *Coleman v. Eyre*, 45 N. Y. 38; *Young v. Snyder*, 2 Phila. 315; *In re Ralston*, 172 Pa. St. 104; *Society v. Campbell*, 13 L. R. A. 601; *Reed v. Reed*, 56 Vt. 492.)

The discovery of the valuable vein of corundum by appellants and their location of the same as a mining claim, and their conveyance of the information of the value of the claim, and of its existence, to the respondent, was a sufficient consideration for his contract. (*Reed v. Golden*, 28 Kan. 632; *McLaughlin v. Barnard*, 2 E. D. Smith, 372.)

Where a contract, required by the statute to be in writing, is not in writing, but it has been partly performed, by one of the parties, so as to put him in a situation which would be a fraud

upon him unless the contract be executed, or where a consideration has not been expressed, but one of the parties has executed the contract or partly executed it to his disadvantage, such a contract should be performed, and if performance be refused, specific performance should be decreed by a court of equity. (Code of Civil Procedure, Sec. 3275; Civil Code, Sec. 2342; *Arguello v. Edinger*, 10 Cal. 150; Pomeroy on Specific Performance of Contracts, Secs. 103, 104, 105, 106 and 107.)

Mr. John A. Luce, for Respondent.

The grant to the Northern Pacific Railroad, Act of Congress, July 2, 1864, Chap. 217, 13 Statutes at Large, 365, among other things, provided: "That all mineral lands be and the same are hereby excluded from the operations of this Act." Prior to the decision in the case of *Barden v. Northern Pacific Railroad*, 154 U. S. 208, the Supreme Court of the United States had uniformly construed the different Acts of Congress, making grants in aid of the construction of railroads to be grants *in praesenti*, and that when the general route was definitely fixed, and the sections granted became susceptible of identification, the title then attached as of the date of the grant. (*Wisconsin Central Railroad Co. v. Price County*, 133 U. S. 496-507; *Schulenberg v. Harriman*, 21 Wallace, 44; *Leavenworth, Lawrence & Galveston Railroad v. United States*, 92 U. S. 733; *Missouri, Kansas, etc. Railway v. Kansas Pacific Railway*, 97 U. S. 491; *Railroad Company v. Baldwin*, 103 U. S. 426; *St. Paul & Pacific Railroad v. Northern Pacific Railroad*, 139 U. S. 1-5; *Deseret Salt Co. v. Tarpey*, 142 U. S. 241-247.)

Until the decision in the *Barden Case*, it was the uniform rule in the Department of the Interior and of the Supreme Court of the United States, as announced in numerous decisions, that the exceptions of mineral lands in those grants and in the statutes authorizing the acquiring of title under townsite, pre-emption, homestead and other Acts, applied only to such mines as were *known* to exist at the time title passed. (*Davis' Administrator v. Wiebold*, 139 U. S. 507-524, 527.)

The *Barden Case* changed the rule above cited only in so far as it affected the time of the identification of the lands as mineral or non-mineral, and holds that the lands are subject to exploration and inquiry as to the mineral or non-mineral character at any time prior to the issuance of patent. (154 U. S. 319, 327.) Under the decision in the *Barden Case* and under the authority granted to the Secretary of the Interior and the Mineral-Land Commissioners by the Act of February 28, 1895, the classification of the land now owned by respondent as non-mineral land fixed the character of said land and upon the issuance of the patent this land passed absolutely to the Northern Pacific Railway Company. The decision of the Land Department became and was absolutely final and conclusive against collateral attack, and this decision was not open to rebuttal in an action at law. (*Smelting Company v. Kemp*, 104 U. S. 636-640-641; *Steele v. Smelting Co.*, 106 U. S. 447-451; *Heath v. Wallace*, 138 U. S. 573-585; *Knight v. Land Association*, 142 U. S. 161-178; 154 U. S. p. 330, 341; *Moore v. Smaw*, 17 Cal. 226; *Deffebach v. Hawke*, 115 U. S. 392, 406; *Casey v. Thieviege*, 19 Mont. 341; *Colorado C. & I. Co. v. United States*, 123 U. S. 307-328.)

The patent was evidence that the patentee was entitled to the land and passed the exclusive title to it. Upon the issuance of the patent by the government the land ceased to be land of the United States. (*United States v. Schutz*, 102 U. S. 378-396; *Johnson v. Tousley*, 13 Wallace, 72; *Hoofnagle v. Anderson*, 7 Wheat. 212; *Boggs v. Merced Mining Co.*, 14 Cal. 279-363; *Bagnell v. Broderick*, 12 Peters, 436; *Greene v. Liler*, 8 Cranch, 230; *Minter v. Curmmelin*, 18 How. 87-89; *Smelting Co. v. Kemp*, 104 U. S. 636-640-641; *Steele v. Smelting Co.*, 106 U. S. 447; *French v. Fyan*, 93 U. S. 169-172; *Wilcox v. Jackson*, 13 Peters, 498, on page 513; *Whitney v. Morrow*, 112 U. S. 693, 695.)

The attempt by the appellants to enter upon land owned, occupied and possessed by respondent gave the appellants no

interest in this land which they could convey to any person or which could be an adequate consideration for any contract whatever. This exact point was passed upon in *Mayger v. Cruse*, 5 Mont. 485, Opin. 494.

Specific performance cannot be enforced against a party to a contract if he has not received an adequate consideration for the contract. (Civil Code, Sec. 4417; *Mayger v. Cruse*, 5 Mont. 485, Opin. 495; *Ward v. Yorba*, 123 Cal. 447, 56 Pac. 58; *Morrill v. Everson*, 19 Pac. 190.)

If the land sought to be conveyed to the appellants belongs to the United States, then the respondent had no title and has no title which he can convey to the appellants, and therefore the court would not decree a specific performance. (*Williams v. Mansell*, 19 Fla. 546; *Northrop v. Boone*, 66 Ill. 368; 20 Ency. Pleading and Practice, 451, and cases cited.) If, however, as has been shown, the title passed to the Northern Pacific Railroad, and the deed from the railroad to respondent exempted the minerals, then if the minerals belong to the Northern Pacific Railroad, respondent has no right thereto which he could convey or which the court would compel him to convey to the appellants. Nor could the appellants have acquired any right, title or interest, by their said location, in or to the minerals belonging to the Northern Pacific Railroad.

It is also insisted by counsel for appellants: (1) That a compromise of a doubtful claim is a sufficient consideration for a contract, and (2) That mutual and concurrent promises are sufficient consideration to support each other. In urging these two propositions, counsel has confused the difference between the consideration for an ordinary contract and that required where a specific performance is sought for the sale of land. In the latter kind of contracts, it is not enough that the consideration be a valuable one, but it must be adequate, fair and reasonable in all respects. (*Seymour v. Delancey*, 6 Johns. Ch. 222; *Dunlap v. Kelsey*, 5 Cal. 181; *Bruck v. Tucker*, 42 Cal. 346, on pages 353 and 354; *Winter v. Goebner*, 30 Pac. 51-52, af-

firmed 40 Pac. 570; *Mayger v. Cruse*, 5 Mont. 485, 495; Civil Code, Secs. 4417, 4419; *Ferguson v. Blackwell*, 58 Pac. 647; *Cathcart v. Robinson*, 5 Pet. 264; *Ducie v. Ford*, 8 Mont. 233-239, C. S. 138 U. S. 587.)

It is the universal rule that the description of the land sought to be conveyed must be given with absolute certainty. (20 Ency. Pleading and Practice, 449, and cases cited; *Ferris v. Irving*, 28 Cal. 645; *Day v. Griffith*, 15 Iowa, 104; *Jordan v. Deaton*, 23 Ark. 704; *Shelton v. Church's Admr's*, 10 Mo. 774; *Wiegert v. Franck*, 56 Mich. 200; 22 Am. & Eng. Ency. of Law, 963-968; *Tetford v. Trimble*, 87 Mo. 226.) It is the universal rule that a contract must be certain in all its terms or it will not be enforced. (*Stanton v. Singleton*, 59 Pac. 146; *Whitehill v. Lowe*, 37 Pac. 589; *Reed v. Lowe*, 29 Pac. 740; *Winter v. Goebner*, 30 Pac. 51.) The granting or refusing of a decree of specific performance rests in the sound discretion of the court. (*Reid v. Mix*, 66 Pac. 1021; *Mayger v. Cruse*, 5 Mont. 485.)

MR. COMMISSIONER CLAYBERG prepared the following opinion for the court:

This is an appeal from a judgment against plaintiffs. The action was brought for the specific performance of a contract for the conveyance of land. Defendant filed a demurrer to the complaint, which was sustained by the court, and, plaintiffs having elected to stand upon their complaint, judgment followed for defendant.

The cause of action set forth in the complaint is very peculiar, and the allegations of the complaint are, briefly, as follows: That on and prior to February 23, 1900, the defendant was the owner, by conveyance from the Northern Pacific Railway Company, of section 23, township 3 south, of range 3 east, Gallatin county, and in the possession thereof; that he was also the owner of the right to use the waters of Elk creek in connection with said land; that plaintiffs, prior to February 23, 1900, discovered upon said land "a vein or lode of corundum-bearing rock,"

and believing said land to be unoccupied land of the United States and said vein or lode open to location, duly located a claim "upon and along said vein" upon and across said land; that the United States, in its grant of this land to the Northern Pacific Railway Company, reserved and exempted therefrom "all minerals found in the soil of said real estate," and that the railway company made the same reservation in its conveyance to defendant; that prior to June 30, 1897, the proper mineral land commissioners of the United States reported this land as nonmineral, and classified it as such, whereupon the railway company applied to the Commissioner of the General Land Office for leave to enter it, which application was approved, and on July 12, 1897, a patent was issued to the railway company, which reserved "all minerals contained in the soil" of said land, and that afterward the railroad company conveyed to the defendant, making the same reservation; that on or about February 23, 1900, plaintiffs informed defendant that they had discovered this vein, and had located and staked a mining claim upon said land, and that the claim, if properly worked, would be of great value; that by reason of the grant to the defendant and his predecessors, and the reservations therein contained, the plaintiffs and defendant were in doubt as to their respective legal rights in and to the aforesaid vein; that it was recognized by the respective parties that such rights could only be determined by litigation, which might be further complicated by the assertion of the rights of the government and the railway company, respectively; that for the purpose of avoiding such litigation and preventing costs, expenses and delays, and for the purpose of amicably settling their differences; and in consideration of the discovery and location of this claim, and of the mutual promises and agreements between the parties, it was agreed that plaintiffs should transfer to the defendant an undivided one-third interest in said lead or lode, and that defendant should transfer to plaintiffs an undivided two-thirds interest in said lead or lode, together with the necessary amount of real estate covered by said location to enable the lode to be operated, and

also a right to the use of the waters of Elk creek necessary to the mining and treatment of ores and the operation of said mine; that the respective transfers should be mutually made within a reasonable time from the date of said agreement; that afterwards, and prior to the commencement of the suit, and prior to the refusal of defendant to make such transfer, plaintiffs, relying upon the agreement of defendant as aforesaid, in good faith expended large sums of money in an attempt to interest capital in the operation, exploration and development of said lode or lead; that thereafter, and prior to the commencement of the suit, plaintiffs offered to convey to said defendant an undivided one-third interest in said lode or claim, and demanded that defendant should comply with the conditions of the agreement on his part, and convey to the plaintiffs an undivided two-thirds interest therein, but that defendant has failed and refused so to do.

The complaint then sets forth the particular description of the land in question so to be conveyed, in the following language: "An undivided two-thirds (2-3) interest in and to a strip of land not exceeding 300 feet in width, running diagonally across the upper portion of section 23, in Tp. 3 south, of R. 3 east, in the county of Gallatin, state of Montana, at the place on said section where a certain lead or lode of corundum-bearing rock is contained and situate, said strip of land to conform to the meandering of said vein or lode of corundum-bearing rock, together with the necessary ingress and egress to the same for the purpose of mining, milling and marketing the ore therefrom, and otherwise prospecting and operating said lode, together with the right to such use of the water right of said defendant, consisting of the right to the use of the waters of said branch of Elk creek, in said county and state, as may be necessary for the proper operation, treatment, mining, milling and concentration of the ores of said lode, extending in a northeasterly and southwesterly direction from the principal point of discovery and development thereon of said lode to the limits of said section."

The demurrer was based upon the grounds that the complaint did not state facts sufficient to constitute a cause of action, and that it was ambiguous, uncertain and unintelligible in certain respects set forth in the demurrer.

The only question necessary to consider is, does the complaint state facts sufficient to constitute a cause of action? In order to arrive at a correct conclusion as to the alleged rights of plaintiff in or to any of the land in question, we must consider and determine the character and legal effect of the patent to the land, under which defendant is alleged to have acquired ownership. To this consideration a brief review of the source of title seems important.

Defendant is alleged to claim ownership under a patent issued by the United States to the Northern Pacific Railway Company. In 1864 Congress passed an Act granting to the Northern Pacific Railroad Company "every alternate section of land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of the railway line as said company may adopt through territories of the United States," extending from Lake Superior to Puget Sound. (Act July 2, 1864, c. 217, 13 Stat. 365.) At the next session Congress amended this grant by providing "that all mineral lands be, and the same are, hereby excluded from the operation of this Act." (Res. Jan. 30, 1865, No. 10, 13 Stat. 567.)

It is apparent from these provisions of the grant (which are all that are material to the questions herein involved) that mineral land did not pass by the grant. The Supreme Court of the United States have always held that the grant was, *in praesenti*, floating in its character until the line of the railroad was definitely located, when it attached to each alternate section mentioned in the grant, and became fixed in its character. When the land was surveyed by the government the particular sections mentioned in the grant were specifically designated, and the grant then took effect from its date. Under this decision the railway company insisted that the character of the land, as to

whether mineral or not, must be determined as of date of the grant, and, if it was not then known to be mineral, it passed by the grant. This condition seems to have been recognized by the Supreme Court of the United States until it had for consideration the case of *Barden v. N. P. Ry. Co.*, 154 U. S. 288, 14 Sup. Ct. 1030, 38 L. Ed. 992, wherein it was decided that all mineral land except iron and coal, whether known or unknown, was excluded from the grant. Subsequent to this decision Congress passed an Act "to provide for the examination and classification of certain lands in the states of Montana and Idaho." (Act Feb. 26, 1895, c. 136, 28 Stat. 683.) Section 7 of this Act provides: "No patent or other conveyance or title shall be issued or delivered to the Northern Pacific Railroad Company for any lands in such districts until such lands shall have been examined and classified as non-mineral." Under the provisions of this Act, mineral land commissioners were appointed by the government to examine and classify, as to their mineral character, all lands, under the aforesaid grant, claimed by the Northern Pacific Railroad Company in the above-mentioned states. The complaint alleges full compliance with this Act, and the issue of patent by the United States to the Northern Pacific Railway Company, the successor in interest to the Northern Pacific Railroad Company, the grantee named in the original grant.

Now, what is the effect of this patent? Congress has provided for the disposition of various classes of public lands, and has authorized the officers of the Land Department to ascertain the character of such land and issue patent therefor. In the absence of fraud, imposition or mistake, the determination of that department as to the character of land is conclusive. (*Barden v. N. P. Ry. Co.*, *supra*, and cases cited.) No fraud, imposition or mistake has been alleged, and, the patent having been issued, it is conclusive that the land in question is non-mineral in its character.

Plaintiffs' alleged rights were originated by the discovery and location of a mineral vein within the limits of the land al-

leged to have been patented to defendant's predecessor in interest. Section 2319, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1424), provides: "All valuable mineral deposits in mineral lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are contained, to occupation and purchase." Under this section, in order to make a location, surface ground, including the vein or lode, must be appropriated, and such surface ground must belong to the United States. (*State ex rel. Anaconda Copper Mining Co. v. District Court*, 25 Mont. 504, 65 Pac. 1020, and cases cited.) Under plaintiffs' own allegations, none of the surface ground of the land in question was owned by the United States, it having been patented to the Northern Pacific Railway Company. There can be no doubt, therefore, that plaintiffs, by their attempted location of a mineral claim upon the land in question, acquired no rights at all. According to their own showing the "minerals in the soil" was the only thing remaining in the government. This court knows of no statute of the United States which provides for the acquirement of "mineral in the soil," aside from the mineral statute above quoted, which requires the location of certain surface ground, including the minerals sought to be obtained. Plaintiffs do not claim to be the successors in interest of the United States in and to the "minerals in the soil," otherwise than by the making of a mining location under the laws of the United States.

There is still another objection to the validity of plaintiffs' claimed location. The surface of the entire section No. 23 had been patented by the government to the Northern Pacific Railway Company, and conveyed to defendant. Under this conveyance the defendant was entitled to the exclusive possession of all the surface ground of such section. Any entry by any other person for any purpose, without defendant's consent, was a trespass upon the rights of the defendant. It has been uniformly held by the Supreme Court of the United States that a valid mining claim cannot be initiated by the commission of a

trespass. (*Clipper M. Co. v. Eli M. Co.*, 24 Sup. Ct. 632, 48 L. Ed. —, and cases cited.) We are therefore clearly of the opinion that the pretended location of a mining claim by the plaintiffs was absolutely of no force or effect.

But again, the contract of which specific performance is sought is without adequate consideration; the only thing of value to be surrendered by plaintiffs is an alleged interest in a certain vein. We have seen that they had no such interest, and therefore could not surrender or convey the same or any part thereof.

But it is claimed by plaintiffs that the information given by them to defendant of the existence of this vein in his land was sufficient consideration. Of what value would such information be to defendant unless plaintiffs could also furnish to him the means of acquiring the subject-matter disclosed? By their own showing, the minerals contained in such vein were reserved by the United States. We do not consider the validity of this alleged reservation by the government (which is extremely doubtful: *Silver Bow M. & M. Co. v. Clarke et al.*, 5 Mont. 378, 5 Pac. 570), because, if it is void, all "minerals in the soil" passed by patent, and plaintiffs show no interest therein.

Plaintiffs also allege that the settlement of the matters in dispute between the parties without litigation was sufficient consideration. While in some instances this might be sufficient to support some contracts, we are clearly of opinion that the allegations of plaintiffs in this case do not disclose such an adequate consideration as is necessary to support a suit for specific performance. (Section 4417, Civil Code; *Mayger v. Cruse*, 5 Mont. 485, 6 Pac. 333; *Finlen v. Heinze*, 28 Mont. 548, 73 Pac. 123.)

Neither do we believe that the complaint contains a sufficiently specific description of the property involved to warrant any decree.

We advise that the judgment appealed from be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment is affirmed.

MR. JUSTICE HOLLOWAY, being disqualified, takes no part in this decision.

MEMORANDA

OF

DECISIONS RENDERED WITHOUT WRITTEN OPINIONS DURING THE PERIOD EMBRACED
IN THIS VOLUME.

No. 1,851.—THE MONTANA JOCKEY CLUB, RESPONDENT, *v.* THE CITY OF BUTTE ET AL., APPELLANTS.

Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

On motion to dismiss appeal.

Decided March 26, 1904.

PER CURIAM.—Upon motion of appellants this appeal is by the court dismissed at the cost of appellants.

Mr. E. M. Lamb, and Mr. J. L. Templeman, for Appellants.

No. 1,895.—STATE OF MONTANA EX REL. JAS. LESMAN, APPELLANT, *v.* DAVID HAWTHORNE, JUSTICE OF THE PEACE, RESPONDENT.

Appeal from District Court, Carbon County; Frank Henry, Judge.

On motion to dismiss appeal.

Decided April 6, 1904.

PER CURIAM.—The motion to dismiss the appeal is by the court sustained and the appeal dismissed, without prejudice, however, to the right to move to reinstate.

Mr. Geo. W. Burke, Mr. F. C. Woodward, and Mr. J. H. Ruberson, for Appellants.

Mr. L. Q. Caswell, and Mr. Sydney Fox, for Respondent.

No. 2,038.—E. G. WOOD, RESPONDENT, *v.* DUDLEY C. SMITH, APPELLANT.

Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

On motion to dismiss appeal.

Decided May 2, 1904.

PER CURIAM.—On consideration, it is now here ordered and adjudged that the motion to dismiss the appeal herein be and the same is hereby sustained and the appeal dismissed.

Mr. B. S. Thresher, for Respondent.

Mr. John J. McHatton, for Appellant.

No. 1,990.—STATE OF MONTANA EX REL. PATRICK RYAN, RELATOR, *v.* JOHN WESTON, RESPONDENT.

Original. *Quo warranto.*

Decided May 4, 1904.

On motion to dismiss proceeding.

PER CURIAM.—Upon due consideration by the court the motion to dismiss this proceeding is sustained and the proceeding dismissed.

Mr. W. E. Carroll, and Mr. C. P. Connolly, for Relator.

Mr. L. P. Forestell, and Mr. J. B. Roote, for Respondent.

No. 2,068.—STATE OF MONTANA EX REL. JAS. DONOVAN, RELATOR, v. T. A. WILLIAMS, RESPONDENT.

Original. *Quo warranto.*

Decided May 10, 1904.

PER CURIAM.—The application heretofore submitted to and by the court taken under advisement, is this day denied.

Mr. Jas. Donovan, for Relator.

No. 1,654.—IN RE DISBARMENT OF W. W. LIKEN.

Original. Disbarment proceeding.

Decided May 10, 1904.

PER CURIAM.—The application for the disbarment of W.

W. Liken is this day by the court dismissed, without prejudice, however, to the right to reinstate.

Mr. Peter Breen, for the State.

No. 2,076.—STATE OF MONTANA EX REL. WYMAN ELLIS ET AL., RELATORS, *v.* J. H. CALDERHEAD, STATE AUDITOR, RESPONDENT.

Original. Writ of mandate.

Decided June 18, 1904.

PER CURIAM.—On consideration, it is now here ordered and adjudged that the motion to quash be and the same is hereby sustained and the proceeding dismissed.

Mr. M. S. Gunn, for Relators.

Mr. Jas. Donovan, and *Messrs. H. G. & S. H. McIntire*, for Respondent.

No. 2,079.—STATE OF MONTANA EX REL. JAS. DONOVAN, ATTORNEY GENERAL, RELATOR, *v.* DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF MONTANA ET AL., RESPONDENTS.

Original. Writ of supervisory control.

Decided June 22, 1904.

PER CURIAM.—On consideration, it is now here ordered and adjudged that the order to show cause heretofore issued herein, be and the same is hereby quashed and the proceedings dismissed.

Mr. Jas. Donovan, for Relator.

Mr. T. J. Walsh, and *Mr. C. B. Nolan*, for Respondents.

INDEX.

ACTIONS.

Form—Adverse Claims—Mines.

1. Since U. S. Rev. St. Sec. 2326 (U. S. Comp. St. 1901, p. 1430), providing that an adverse claimant to a mining claim, within thirty days after filing his claim, must commence proceedings in a court of competent jurisdiction to determine the right of possession, etc., does not prescribe the form of action, the character of the suit to be brought thereunder depends on state practice.—*Mares v. Dillon*, 117.

Dismissal by Plaintiff—Costs.

2. Under Code of Civil Procedure, Section 1004, Subdivision 1, the payment of defendant's costs is not a prerequisite to the exercise of plaintiff's right to dismiss the action.—*Miller v. Northern Pacific Ry. Co.*, 289.

Dismissal by Plaintiff—Jurisdiction—Costs.

3. When a plaintiff at any time before trial files a *praecipe* with the clerk for the dismissal of the action, and the dismissal has been entered on the register of actions, the case is dismissed, and has passed beyond the jurisdiction of the court, save for the sole purpose of entering a judgment for costs in favor of defendant under Section 1008, Code of Civil Procedure.—*Miller v. Northern Pacific Ry. Co.*, 289.

Between Same Parties—Former Trial—Evidence—Admissibility.

4. The testimony of a witness on a former trial is inadmissible in the absence of a showing that it was given in an action between the same parties relating to the same matter.—*Leggat v. Carroll*, 384.

AFFIDAVITS.

See NEW TRIAL, 2, 3.

DISTRICT JUDGES.

EVIDENCE, 2.

Mines—Inspection—Information and Belief.

1. Where, in an action to have defendant declared a constructive trustee of an interest in mining property, plaintiff applied for an inspection of certain books and papers, together with defendant's workings of the mine, and defendant appeared at the hearing and filed a counter affidavit which controverted none of the statements contained in plaintiff's affidavit as to the existence of the letters and other documents, defendant's possession thereof, or that they related to the merits of the action, but only denied that defendant was in possession of such records, etc., "within the state of Montana," it was no objection that the affidavits on which plaintiff's application was based were on information and belief.—*State ex rel. Boston & Mont. Con. C. & S. M. Co. v. Dist. Court*, 206.

APPEAL

Action for Rent—Waiver of Error.

1. Even if it is error for the court, in an action for rent, to undertake, at the instance of the parties, to determine defendants' liability, under the terms of the lease, for an installment of rent not in fact due at the commencement of the action, defendants, in whose favor was the decision, and who have not appealed, may not complain of such action of the court.—*Bickford v. Ktricin*, 1.

Judgment on Pleadings.

2. Although Code of Civil Procedure, Section 741, provides that an appeal cannot be taken from a denial of judgment on the pleadings, and that subsequent proceedings of either party are not prejudiced thereby, it was proper for the court to enter judgment for defendant after overruling plaintiff's motion for judgment on the pleadings, where plaintiff, instead of proceeding to trial upon the merits, announced that he would stand on the motion as made.—*Moore v. Murray*, 13.

Action in Claim and Delivery—Correction of Judgment.

3. The trial court has no authority,—after an appeal from a judgment in a claim and delivery action has been perfected, to correct the judgment by entering a judgment in the alternative.—*Hynes v. Barnes*, 25.

Failure to Have Proper Judgment Entered.

4. A party in whose favor a judgment is rendered cannot, by failing to see that a proper judgment is entered, deprive his adversary of the right of appeal.—*Hynes v. Barnes*, 25.

Divorce—Issues—Implied Findings.

5. Where, in a suit for divorce on the ground of adultery, plaintiff's wife, by way of recrimination, alleged cruelty and desertion on the part of plaintiff, which he denied by replication, and the jury specifically found against defendant on all the issues in the case, but the court adopted only certain findings returned by the jury—all of which related to the adultery of defendant, and, of its own motion, set aside and refused to adopt all the further findings, and granted plaintiff a divorce, without making any express findings on the issues raised by defendant's answer,—the judgment, on appeal, will be reversed as not supported by the findings, notwithstanding the prevalence of the doctrine of implied findings.—*Bordeaux v. Bordeaux*, 36.

Rules—Briefs—Specification of Errors.

6. Supreme Court Rule X, Subdivision 3, does not require appellant to set out in his brief the reasons why he claims that the decision objected to is erroneous, and hence a specification that the court erred in sustaining defendant's motion for a nonsuit is sufficient without further statement.—*Nord v. Boston & Mont. Con. C. & S. M. Co.*, 48.

Bills of Exceptions—Specification of Errors.

7. A bill of exception need not contain a specification of errors of law relied upon.—*Nord v. Boston & Mont. Con. C. & S. M. Co.*, 48.

Statement of the Case—Bills of Exception.

8. Code of Civil Procedure, Section 1173, Subdivision 3, refers exclusively to a statement of the case, and has no reference to bills of exception.—*Nord v. Boston & Mont. Con. C. & S. M. Co.*, 48.

Nonsuit—Bills of Exceptions.

9. Where plaintiff saved his exception to a ruling granting defendant's motion for a nonsuit, and settled his bill of exceptions containing the testimony and exception to the ruling of the court, such exception is all that is required to be shown by the bill in order to save plaintiff's right to urge that the court's ruling in granting the nonsuit was erroneous.—*Nord v. Boston & Mont. Con. C. & S. M. Co.*, 48.

Action for Personal Injuries—Contributory Negligence—Variance.

10. Where, in an action for injuries to a servant, defendant moved for a nonsuit at the close of plaintiff's evidence, on the ground that the evidence conclusively showed that plaintiff was guilty of contributory negligence or that he assumed the risk, it could not be alleged for the first time on appeal that the nonsuit was properly granted by reason of an alleged variance between the pleading and proof.—*Nord v. Boston & Mont. Con. C. & S. M. Co.*, 48.

Final Judgment—Special Order After Judgment—Dismissal.

11. Code of Civil Procedure, Section 1722, as amended by Session Laws 1899, p. 146, authorizes an appeal from a final judgment or from any special order made after final judgment. Section 1004 authorizes the dismissal of an action in certain cases, and declares that such dismissal is made for entry in the clerk's register. *Held*, that an entry noting the filing of an agreement to dismiss is not a dismissal from which an appeal can be taken.—*Kinman v. Scheuer*, 73.

Special Order After Judgment—Dismissal.

12. Under Code of Civil Procedure, Section 1722, authorizing an appeal from any special order made after final judgment, an order overruling a motion to set aside a pretended judgment of dismissal, which was in fact not a dismissal within Section 1004, authorizing dismissal, is not appealable.—*Kinman v. Scheuer*, 73.

Final Judgments—Special Orders—Dismissal.

13. Under Code of Civil Procedure, Section 1722, authorizing appeals from final judgments and special orders made after final judgments, an appeal from an order denying a motion to adopt a general verdict and special findings and to set aside the special verdict in a suit in equity must be dismissed where the record shows no judgment of dismissal or other final judgment.—*Kinman v. Scheuer*, 73.

Justices of the Peace—Notice.

14. Code of Civil Procedure, Section 1760, provides that an appeal from a justice is to be taken by filing a notice of appeal with the justice, and serving a copy on the adverse party. *Held* that, in the absence of any showing to the contrary, it is to be presumed that a notice filed with the justice was properly served.—*Morin v. Wells et al.*, 76.

APPEAL

Action for Rent—Waiver of Error.

1. Even if it is error for the court, in an action for rent, to undertake, at the instance of the parties, to determine defendants' liability, under the terms of the lease, for an installment of rent not in fact due at the commencement of the action, defendants, in whose favor was the decision, and who have not appealed, may not complain of such action of the court.—*Bickford v. Kirwin*, 1.

Judgment on Pleadings.

2. Although Code of Civil Procedure, Section 741, provides that an appeal cannot be taken from a denial of judgment on the pleadings, and that subsequent proceedings of either party are not prejudiced thereby, it was proper for the court to enter judgment for defendant after overruling plaintiff's motion for judgment on the pleadings, where plaintiff, instead of proceeding to trial upon the merits, announced that he would stand on the motion as made.—*Moore v. Murray*, 13.

Action in Claim and Delivery—Correction of Judgment.

3. The trial court has no authority,—after an appeal from a judgment in a claim and delivery action has been perfected, to correct the judgment by entering a judgment in the alternative.—*Hynes v. Barnes*, 25.

Failure to Have Proper Judgment Entered.

4. A party in whose favor a judgment is rendered cannot, by failing to see that a proper judgment is entered, deprive his adversary of the right of appeal.—*Hynes v. Barnes*, 25.

Divorce—Issues—Implied Findings.

5. Where, in a suit for divorce on the ground of adultery, plaintiff's wife, by way of recrimination, alleged cruelty and desertion on the part of plaintiff, which he denied by replication, and the jury specifically found against defendant on all the issues in the case, but the court adopted only certain findings returned by the jury—all of which related to the adultery of defendant, and, of its own motion, set aside and refused to adopt all the further findings, and granted plaintiff a divorce, without making any express findings on the issues raised by defendant's answer,—the judgment, on appeal, will be reversed as not supported by the findings, notwithstanding the prevalence of the doctrine of implied findings.—*Bordeaux v. Bordeaux*, 36.

Rules—Briefs—Specification of Errors.

6. Supreme Court Rule X, Subdivision 3, does not require appellant to set out in his brief the reasons why he claims that the decision objected to is erroneous, and hence a specification that the court erred in sustaining defendant's motion for a nonsuit is sufficient without further statement.—*Nord v. Boston & Mont. Con. C. & S. M. Co.*, 48.

Bills of Exceptions—Specification of Errors.

7. A bill of exception need not contain a specification of errors of law relied upon.—*Nord v. Boston & Mont. Con. C. & S. M. Co.*, 48.

Statement of the Case—Bills of Exception.

8. Code of Civil Procedure, Section 1173, Subdivision 3, refers exclusively to a statement of the case, and has no reference to bills of exception.—*Nord v. Boston & Mont. Con. C. & S. M. Co.*, 48.

Nonsuit—Bills of Exceptions.

9. Where plaintiff saved his exception to a ruling granting defendant's motion for a nonsuit, and settled his bill of exceptions containing the testimony and exception to the ruling of the court, such exception is all that is required to be shown by the bill in order to save plaintiff's right to urge that the court's ruling in granting the nonsuit was erroneous.—*Nord v. Boston & Mont. Con. C. & S. M. Co.*, 48.

Action for Personal Injuries—Contributory Negligence—Variance.

10. Where, in an action for injuries to a servant, defendant moved for a nonsuit at the close of plaintiff's evidence, on the ground that the evidence conclusively showed that plaintiff was guilty of contributory negligence or that he assumed the risk, it could not be alleged for the first time on appeal that the nonsuit was properly granted by reason of an alleged variance between the pleading and proof.—*Nord v. Boston & Mont. Con. C. & S. M. Co.*, 48.

Final Judgment—Special Order After Judgment—Dismissal.

11. Code of Civil Procedure, Section 1722, as amended by Session Laws 1899, p. 146, authorizes an appeal from a final judgment or from any special order made after final judgment. Section 1004 authorizes the dismissal of an action in certain cases, and declares that such dismissal is made for entry in the clerk's register. *Held*, that an entry noting the filing of an agreement to dismiss is not a dismissal from which an appeal can be taken.—*Kinman v. Scheuer*, 73.

Special Order After Judgment—Dismissal.

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Justices of the Peace—Notice.

14. Code of Civil Procedure, Section 1760, provides that an appeal from a justice is to be taken by filing a notice of appeal with the justice, and serving a copy on the adverse party. *Held* that, in the absence of any showing to the contrary, it is to be presumed that a notice filed with the justice was properly served.—*Morin v. Wells et al.*, 76.

Bond—Sureties—Justification—Jurisdiction.

15. Code of Civil Procedure, Section 1763, provides that an appeal from a justice's court to the district court is not effectual for any purpose unless an undertaking be filed, and that appellee may except to the sufficiency of the sureties on the undertaking, and unless they or other sureties justify within five days, the appeal must be regarded as if no undertaking had been given. *Held*, that an exception to the sureties does not divest the jurisdiction of the district court of the appeal; that the requirement of the statute concerning the justification of the sureties is directory, for appellee's benefit, and that he may waive his privilege of excepting to the sureties, or may except to the sureties and afterwards withdraw such exception; that the statute is mandatory only where the appellee insists that the sureties justify within five days.—*Morin v. Wells et al.*, 76.

Bond—Sureties—Justification.

16. Where appellee excepted to the sufficiency of the sureties, and they failed to justify within the statutory period, counsel for the parties had the right to stipulate for an extension of time within which the sureties might justify or a new undertaking be furnished.—*Morin v. Wells et al.*, 76.

Bond—Sureties—Consideration.

17. The parties to an appeal from a justice stipulated for an extension of the time within which the sureties might justify after the time fixed by the statute for their justification had expired, and, within the time so stipulated for, defendant signed as surety. Six months later, the appeal was dismissed. *Held*, that the signature of defendant was not without consideration; it being for the purpose of preventing the appeal from becoming ineffectual and it having, presumptively, operated to stay proceedings for several months.—*Morin v. Wells et al.*, 76.

Construction of Statutes.

18. Statutes must be liberally construed to maintain the right of appeal.—*Morin v. Wells et al.*, 76.

Liability of Counties—Printing Briefs.

19. After a criminal case has been appealed to the supreme court, the duties of the county attorney therein and his power to contract expenses for the county cease, and the duty of the attorney general begins, and, there being no Code provision authorizing it, he has no power to contract on behalf of the county, and the county has no power lawfully to pay, expenses incurred in printing briefs filed on behalf of the state in the appeal.—*Independent Pub. Co. v. County of Lewis and Clarke*, 83.

From Justice's Court—Jurisdiction—Dismissal.

20. Unless an appeal from a justice's court is taken within the time, and effectuated in accordance with the regulations, prescribed in the Code of Civil Procedure, the district court has no jurisdiction of the appeal, except to dismiss it.—*State ex rel. Cobban v. District Court*, 93.

Judgment—Justice's Court.

21. The only appeal from a justice's court provided for by the Code of Civil Procedure, is an appeal from a judgment, hence there is no appeal to the district court from an order made in a justice's court either before or after judgment.—*State ex rel. Cobban v. District Court*, 93.

Mines—Adverse Claims—Trial by Jury—Estoppel.

22. Where, on the trial of a suit to determine an adverse claim to a mining location, a jury was not demanded by either party, and the court tried the case as a suit in equity, without objection by defendant, the latter was estopped to object for the first time on appeal that the action was one at law, and that he was entitled to the verdict of the jury as to which, if either, party was entitled to possession of the ground in question.—*Mares v. Dillon*, 117.

Order Taxing Costs.

23. An appeal does not lie from an order taxing costs, but the error, if any, may be considered on appeal from the judgment.—*Mares v. Dillon*, 144.

View of Premises by Jury—Discretion.

24. Discretion of court in granting a view of premises will not be reviewed on appeal, in the absence of a clear showing of error.—*Maloney v. King et al.*, 158.

Estoppel—Theory of Case.

25. Where plaintiff relied in the trial court on an estoppel arising from defendant's admission in his answer in another suit and not on the proposition that the judgment in such suit was determinative of such facts, she could not change her position on appeal, and claim that the judgment was conclusive as to the facts on which the estoppel was based.—*Flannery v. Campbell*, 172.

Receiver's Compensation—New Trial.

26. No motion lies for a new trial of issues involved in the matter of a claim for compensation and expenses of a receivership, and there can be no appeal from an order denying such a motion.—*Forrester & MacGinniss v. Boston & Mont. Con. C. & S. M. Co.*, 181.

Receiver's Compensation—Judgment.

27. An appeal lies from a judgment allowing the compensation and expenses of a receiver.—*Forrester & MacGinniss v. Boston & Mont. Con. C. & S. M. Co.*, 181.

Judgments—Findings—Exceptions.

28. Under the express provision of Code of Civil Procedure, Section 1114, no judgment can be reversed on appeal for want of a finding at the instance of a party who has not requested the findings, nor in cases of defects in the findings, unless exceptions have been made in the trial court as provided in Section 1115.—*Grogan v. Valley Trading Co.*, 229.

Instructions—Conflicting Evidence.

29. Where the instructions fairly presented to the jury the questions involved, and the evidence is conflicting and is amply sufficient to sustain the verdict, and no reversible error is apparent, the case will, on appeal, be affirmed.—*Roice v. Shannon*, 238.

Conflict in Evidence—Findings.

30. Findings of the trial court, based on conflicting evidence, will not be disturbed on appeal.—*Hennessey v. Kennedy Furniture Co.*, 264.

Conflict in Evidence—Findings.

31. Where there is evidence to sustain the findings of the trial court, and the evidence is conflicting, the findings and decision will not be disturbed on appeal.—*Landeau v. Frazier*, 267.

Failure to Enter Judgment—Effect.

32. Where a suit is dismissed pursuant to a compromise agreement, and defendants neglect to have a judgment for costs entered in their favor, there is no judgment from which they can appeal.—*Musigbrod v. Hartford*, 273.

Refusal to Allow Costs—Judgment.

33. An order refusing to allow costs is not reviewable, except on appeal from the judgment.—*Musigbrod v. Hartford*, 273.

New Trial—Notice of Intention—Grounds.

34. Under a notice of intention to move for a new trial, specifying as grounds the insufficiency of the evidence to justify the decision of the court as regarded plaintiff, the appealing defendant could not urge an objection to the sufficiency of the evidence to sustain the decision in favor of another defendant.—*McNinch v. Crawford*, 297.

Conflict in Evidence.

35. The evidence being conflicting, its sufficiency to sustain the verdict of judgment will not be considered on appeal.—*Butte Mining & Milling Co. v. Kenyon*, 314.

Instructions—Judgment Roll.

36. The instructions, which are a part of the judgment roll, not appearing therein, as it is certified, but being merely in the statement on motion for a new trial, cannot be considered.—*Butte Mining & Milling Co. v. Kenyon*, 314.

Assignments of Error—Briefs—Rules.

37. Assignments of error upon the admission or rejection of testimony not presented in appellant's brief in accordance with the requirements of the Rules of the Supreme Court, will not be considered by the court.—*Butte Mining & Milling Co. v. Kenyon*, 314.

Conflict in Evidence—Insufficiency of Evidence.

38. Where there is a substantial conflict in the evidence, the supreme court on appeal will not reverse the judgment of the lower court on the ground of alleged insufficiency of the evidence.—*Butte Mining & Milling Co. v. Kenyon*, 314.

Statutes—Jurisdiction.

39. The statutory steps necessary to perfect an appeal are jurisdictional, and unless they are taken as provided by the statute, the supreme court has no power to consider the case.—*Butte Mining & Milling Co. v. Kenyon*, 314.

Record—Compliance with Statutes—Instructions.

40. Though the preparation of the record to present to the supreme court is not a jurisdictional matter, nevertheless a substantial compliance with

the statute in this respect is necessary to present alleged errors for review, hence where instructions on appeal do not appear in the judgment roll, but merely in the statement on motion for a new trial, they cannot be considered.—*Butte Mining & Milling Co. v. Kenyon*, 314.

Record—Disposition of Demurrer.

41. When the record on appeal fails to show whether appellant's demurrer to the complaint was overruled or withdrawn, the failure to sustain it cannot be reviewed.—*Hefferlin et al. v. Karlman et al.*, 348.

Witness—Cross-Examination.

42. Error in refusing to permit cross-examination of plaintiffs' witness as to the extent of his admitted interest in the suit is not ground for reversal, where other evidence shows that, for purposes of collection, the witness had assigned to plaintiffs his account against defendants, which constituted one of the causes of action.—*Hefferlin et al. v. Karlman et al.*, 348.

Specification of Errors—Insufficiency of Evidence.

43. Under Code of Civil Procedure, Section 1173, a specification in the statement that the court erred in making a certain finding, "there being insufficient evidence to justify said finding, and the evidence being insufficient to support the same, and said finding is contrary to the evidence, and wholly unsupported thereby," is not a proper specification of the insufficiency of the evidence.—*Schilling v. Curran*, 370.

New Trial—Change of Position of Movant.

44. Where the notice of intention to move for a new trial bases the motion on the ground of insufficiency of the evidence to support certain findings, the movant cannot, on appeal, change his position, and claim that the making of the findings was an error at law.—*Schilling v. Curran*, 370.

Specification—Insufficiency of Evidence—Error in Law.

45. Under Code of Civil Procedure, Section 1173, a specification in the statement that the court erred in making a certain finding of fact, "there being insufficient evidence to justify said finding, and the evidence being insufficient to support the same, and said finding is contrary to the evidence and wholly unsupported thereby," is insufficient to charge error in law.—*Schilling v. Curran*, 370.

Specification of Errors—Insufficiency of Evidence.

46. Under Code of Civil Procedure, Section 1173, a statement which does not specify the insufficiency of the evidence as a ground of the motion must, at least so far as the insufficiency of the evidence is concerned, be disregarded.—*Schilling v. Curran*, 370.

Reopening of Case—Discretion.

47. The reopening of a party's case, after he has closed it, for the purpose of admitting further testimony, is in the discretion of the court below, and will not be disturbed on appeal unless abuse of discretion is shown.—*Schilling v. Curran*, 370.

Implied Findings.

48. Where the record on appeal does not disclose that any findings were requested by either party, or that any were made, all findings necessary to

support the judgment are implied.—*Slater Brick Co. v. Shackleton et al.*, 390.

Findings—Conflict in Evidence.

49. Where the evidence is conflicting, the supreme court on appeal will not disturb the findings of the trial court.—*Slater Brick Co. v. Shackleton et al.*, 390.

Instructions—Judgment Roll.

50. Instructions not being made part of the judgment roll are not open to review.—*Shropshire v. Sidebottom*, 406.

Conflicting Evidence—Judgments—Findings.

51. The judgment, so far as it depends on findings of fact, will not be disturbed on conflicting evidence.—*Way v. Sherman*, 410.

New Trial—Notice of Motion—Dismissal.

52. The fact that the notice of intention to move for a new trial is not in the record is no ground for dismissal of the appeal from the judgment.—*Fordham v. Northern Pacific Ry. Co.*, 421.

Transcript—Manner of Showing Error.

53. The transcript on appeal must show error directly, and not by way of inference or presumption.—*Sicain v. McMillan*, 433.

Supervisory Control—Appeal Adequate Remedy.

54. By a rule of the district court of Silver Bow county, all matters of a criminal nature were to be heard in Department 3 of that court. An accusation under Penal Code, Section 1531, was filed in Department 1, and the judge of that department denied an application for the transfer of the cause to department 3. *Held*, that the supreme court would not issue a writ of supervisory control to compel the removal of the case to Department 3, where it did not appear that, if Department 1 should proceed to a determination of the accusation, accused would suffer any injury for which an appeal would not furnish an adequate remedy.—*State ex rel. Clark v. District Court*, 442.

Justices of the Peace—Trial in District Courts

55. Constitution, Article VIII, Section 23, provides for appeals from justices' courts to the district courts under regulations prescribed by law. Section 11 provides that the district court shall have appellate jurisdiction in such cases arising in justices' courts as may be prescribed by law. Code of Civil Procedure, Section 1760, provides the manner of taking an appeal from the justice's court, and Section 1761 provides that on such an appeal the cause must be tried anew in the district court. *Held*, that only such questions as were raised and presented in the justice's court can be tried on appeal in the district court, and where there was no showing that a motion was made in the justice's court to set aside the judgment and dismiss the cause, but the record showed that the case was tried on issues of fact raised by the answer, it was proper for the district court, on appeal from a judgment for plaintiff, to overrule a motion to dismiss the cause, and to try the issues of fact which had been raised before the justice.—*Clark v. Great Northern Ry. Co.*, 458.

Justices of the Peace—District Courts—Jurisdiction.

56. The district court, sitting as an appellate court, is one of limited jurisdiction, and may only proceed in the manner and to the extent provided by law.—*Clark v. Great Northern Ry. Co.*, 458.

Amended Pleadings—Reversible Error.

57. Where, after a trial amendment, the case proceeded and was tried upon the issues formed by the amended complaint and answer, and it appeared that defendants were afforded every opportunity to present their entire case, the fact that the amendment was not formally incorporated in the complaint was not reversible error.—*Christiansen v. Aldrich et al.*, 446.

Continuance—Discretion.

58. The action of the trial court in refusing or allowing a continuance will not be interfered with on appeal unless there has been an abuse of discretion.—*State v. Howard*, 518.

ATTORNEYS.

Insane Client—Guardian—Fees.

1. That a party becomes insane while indebted to an attorney who was representing him at the time with respect to his property interests does not give such attorney the right *per se* to appear as attorney for the party's guardian, who by reason of such appointment, as provided by Civil Code, Section 3151, becomes responsible for the estate and the proper conduct of the incompetent's affairs.—*State ex rel. Davis v. District Court*, 8.

Fees—Lien—Security—Insanity of Client.

2. Where at the time of the insanity of a client he was indebted to his attorney who had charge of his interests, the appointment of a guardian for the client did not divest the attorney of any lien or security which he had at the time to secure payment of his fees.—*State ex rel. Davis v. District Court*, 8.

Fees—Incompetent's Estate.

3. Under Code of Civil Procedure, Section 2810 *et seq.*, providing for the allowance and payment of claims against the estate of an incompetent by his guardian, a guardian appointed for an incompetent who was indebted to his attorney for fees at the time of such appointment could not pay such attorney the fees claimed to be due out of the funds of the incompetent's estate until such claim had been allowed by the court.—*State ex rel. Davis v. District Court*, 8.

Substitution—Mandamus.

4. Where, from the facts stated on an application for the substitution of attorneys, it was the plain legal duty of the court to grant the application, and was without his proper discretion to refuse the same, the applicant was entitled to *mandamus* to compel the court to grant such application.—*State ex rel. Davis v. District Court*, 8.

Notice—Substitution—Fees.

5. Under Code of Civil Procedure, Section 399, providing that an attorney in an action may be changed on the order of the court on an application of

either client or attorney, after notice from one to the other, an incompetent's guardian was absolutely entitled to have a different attorney substituted to represent him, for the firm which had represented the incompetent prior to the guardian's appointment, notwithstanding the fees due such substituted attorneys have not been paid.—*State ex rel. Davis v. District Court*, 8.

Action for Divorce—Denial of Fees and Suit Money—Abuse of Discretion.

6. Where in an action for divorce, plaintiff alleged that his wife had been guilty of desertion and adultery, which she denied, and, on her application for suit money and attorney's fees, it appeared that plaintiff had property of the value of \$69,000, and it was uncontradicted that a much larger sum than \$200 was necessary to enable defendant to properly prepare her defense, together with her cause of action for a divorce on the ground of desertion and extreme cruelty, alleged in a cross-bill, an order denying defendant's application for attorney's fees, and allowing only \$200 for suit money, was an abuse of discretion.—*Bordeaux v. Bordeaux*, 36.

Fees—Promissory Notes—Collection Without Suit.

7. Under Civil Code, Section 3996, as amended (Session Laws of 1899, page 124), a note made payable with reasonable attorney's fees entitles the holder to collect such fees, where the note is not paid at maturity, and it is placed in the hands of attorneys for collection, though it is not sued.—*Morrison v. Ornbaum et al.*, 111.

Fees—Promissory Note—Collection Without Suit.

8. The right to collect attorney's fees pursuant to the provisions of a mortgage note, where the note is not paid and is placed in the hands of attorneys for collection, though the note is not sued, is not controlled by a stipulation in the mortgage for such fees in case of suit.—*Morrison v. Ornbaum et al.*, 111.

Contract—Attorney in Fact.

9. One who signs a contract only as attorney in fact for a party thereto is not bound by the contract, and it has the same effect, so far as an action against him based thereon is concerned, as if the party had signed only his own name thereto.—*Largey v. Leggat*, 148.

Receivers—Fees.

10. A receiver cannot be allowed fees for counsel to a superintendent in charge of the corporation's property, or for other employes.—*Forrester & MacGinniss v. Boston & Mont. Con. C. & S. M. Co.*, 187.

Suspension—Good Conduct—Reinstatement.

11. Where an attorney was suspended for a specified time, with a provision that he might at the expiration of that time be restored to the privileges of an attorney, on proper petition, supported by satisfactory evidence of good conduct meantime, and at the expiration of that time he petitioned for reinstatement, filing a certificate, signed by nearly every member of the bar of the city where he resided, to the effect that he had conducted himself as, and was, a man of good moral character, he will be reinstated.—*In re Weed*, 456.

BAIL BOND.

See CRIMINAL LAW, 1, 2.

See PLEADINGS, 25, 26, 27, 28, 29.
See JUSTICES OF THE PEACE, 9, 10.

BAILMENTS.

Special Contract—Duty of Bailee for Hire.

1. In the absence of a special contract with reference to the bailment, ordinary care only is required of a bailee for hire.—*Shropshire v. Sidebottom*, 406.

Burden of Proof—Ordinary Care.

2. In an action against a bailee for hire for failure to redeliver the article as agreed, it having been lost, he has the burden of showing he used ordinary care.—*Shropshire v. Sidebottom*, 406.

Negligence of Bailee—Burden of Proof.

3. *Obiter*: Where the bailor alleges negligence on the part of the bailee as the basis of the bailor's right to recover, the burden is on the bailor to prove such allegation.—*Shropshire v. Sidebottom*, 406.

Pastures—Fences.

4. A pasture, in which a bailee for hire of horses put them, and from which they escaped, is in law not inclosed at all, it not being wholly inclosed by a good and sufficient fence.—*Shropshire v. Sidebottom*, 406.

BANKRUPTCY.

Fraudulent Transfers—*Bona Fide* Purchasers.

1. Under Bankruptcy Act of July 1, 1898, a sale by a bankrupt, though made to hinder and defraud creditors, is not void as against a purchaser who did not participate in the fraudulent act of the bankrupt, or have knowledge of such intent or of the bankrupt's insolvency, and who bought not for a cancellation of an antecedent debt or a payment of a merely nominal price, but one which, under the circumstances, was present and fair.—*Schilling v. Curran*, 370.

Insolvency of Debtor.

2. Under Bankruptcy Act of July 1, 1898, the insolvency of a debtor, to avoid a transfer, must be one existing at the date thereof, and not one arising thereafter.—*Schilling v. Curran*, 370.

Pleadings—Presumptions of Solvency.

3. In proceedings by a trustee in bankruptcy to recover property of the bankrupt sold within four months prior to the filing of the petition, where the pleadings contained no allegation of insolvency at the date of the transfer of the property, and the record did not disclose any facts tending to show the same, the supreme court will presume that on the date of the transfer the debtor, subsequently adjudged a bankrupt, was solvent.—*Schilling v. Curran*, 370.

Solvency of Debtors—*Bona Fide* Purchasers.

4. Where, at the time of a sale of property, debtors were solvent, and a person, in good faith and for a valuable consideration, purchased certain property of them, and possession was turned over to him, as required by

the state statutes, the sale was not null and void as against the creditors of the debtors by the laws of the state; and hence the property could not be recovered under Bankruptcy Act of July 1, 1898, for the benefit of the debtors' creditors, on the debtors being subsequently adjudged bankrupt.—*Schilling v. Curran*, 370.

Bona Fide Purchasers—Consideration—Findings.

5. In proceedings by a trustee in bankruptcy, to recover property sold by the bankrupt within four months prior to the filing of the petition, where the court found that the property was purchased in good faith, without any intent to hinder, delay or defraud creditors of the bankrupt, the purchaser paying therefor in cash a certain sum, and found, as a conclusion of law, that he was a *bona fide* purchaser for a present fair consideration, a further finding of fact as to whether the purchase was made for a present fair consideration was unnecessary.—*Schilling v. Curran*, 370.

Findings.

6. In proceedings by a trustee in bankruptcy to recover property sold by the bankrupt within four months prior to the filing of the petition, a finding of fact as to whether the property was sold within four months preceding the date of the adjudication in bankruptcy was unnecessary, where it was undisputed on the trial that the sale was made on June 2d, and that the adjudication was made on July 18th of the same year.—*Schilling v. Curran*, 370.

Testimony—Fraudulent Intent.

7. In proceedings by a trustee in bankruptcy to recover from the purchaser property sold by the bankrupt within four months prior to the filing of the petition, testimony that the bankrupt secreted the money he received from the sale for the purpose of defrauding his creditors, being in reference to a transaction occurring after the sale, and payment of the money, in which it was not claimed that the purchaser participated, was not competent for the purpose of showing any participation by him in the fraudulent intent of the bankrupt, or that he had knowledge of such fraudulent intent at the time of the sale.—*Schilling v. Curran*, 370.

BIAS AND PREJUDICE OF DISTRICT JUDGES.

See DISTRICT JUDGES, 1-14.

See CONSTITUTION, 11-21.

See LEGISLATURES, 4, 7.

See CHANGE OF VENUE, 1-5.

See CONTEMPT, 5, 9.

BILLS OF EXCEPTIONS.

Rules—Briefs—Specification of Errors—Nonsuit.

1. Supreme Court Rule X, Subdivision 3, does not require appellant to set out in his brief the reasons why he claims that the decision objected to is erroneous, and hence a specification that the court erred in sustaining defendant's motion for a nonsuit is sufficient without further statement.—*Nord v. Boston & Mont. Con. C. & S. M. Co.*, 48.

Specification of Errors.

2. A bill of exceptions need not contain a specification of errors of law relied upon.—*Nord v. Boston & Mont. Con. C. & S. M. Co.*, 48.

Statement of the Case.

3. Code of Civil Procedure, Section 1173, Subdivision 3, refers exclusively to a statement of the case, and has no reference to bills of exception.—*Nord v. Boston & Mont. Con. C. & S. M. Co.*, 48.

Nonsuit—Error.

4. Where plaintiff saved his exception to a ruling granting defendant's motion for a nonsuit, and settled his bill of exceptions containing the testimony and exception to the ruling of the court, such exception is all that is required to be shown by the bill in order to save plaintiff's right to urge that the court's ruling in granting the nonsuit was erroneous.—*Nord v. Boston & Mont. Con. C. & S. M. Co.*, 48.

Transcripts—Official and Private Stenographers.

5. In making up statements or bills of exceptions, litigants are under no obligation to use only the transcript of the evidence furnished by the official stenographer. They may for that purpose use the notes of any person which furnish a correct narrative of the proceedings.—*York v. Steward*, 367.

Record—Correction—Mistakes.

6. A bill of exceptions or statement once settled and filed becomes a part of the record, not subject to correction, except upon a showing that some mistake has been committed, in which case it should be corrected, and not stricken from the files.—*York v. Steward*, 367.

Service—Waiver.

7. Objection that the bill of exceptions was not served in the manner provided by Code of Civil Procedure, Section 1831, is waived by the presenting of amendments to the proposed bill.—*Fordham v. Northern Pacific Ry. Co.*, 421.

BRIEFS.

See, also, RULES OF SUPREME COURT.

See BILL OF EXCEPTIONS, 1.

Assignments of Error—Appeal.

1. Assignments of error upon the admission or rejection of testimony not presented in appellant's brief in accordance with the requirements of the Rules of the Supreme Court, will not be considered by the court.—*Butte Mining & Milling Co. v. Kenyon*, 314.

Specification of Errors—Rules.

2. Under the Rules of the Supreme Court, errors not specified in the brief will not be considered.—*Schilling v. Curran*, 370.

BUILDING AND LOAN ASSOCIATIONS.

Mortgages—By-Laws—Evidence.

1. In an action to foreclose a building and loan association mortgage it was immaterial, on the question of the admissibility of matter which purported to be the by-laws of the association, whether it in fact constituted such by-laws or not, where it constituted a part of the written contract

existing between the shareholder and the association, and was given to him by the association as the by-laws.—*Floyd-Jones v. Anderson et al.*, 351.

By-Laws—Dues—Mortgages—Evidence.

2. The by-laws of a building and loan association made the secretary the custodian of its books and records, and charged him with the transaction of business relative to the issue and cancellation of stock. About the time of the maturity of A.'s stock, the secretary wrote to B., acknowledging the receipt of dues, and stated in the letter that the five-year stock (which was the kind that A. had) contained certain burdensome conditions, and that other longer term stock had been issued, which was more advantageous to the shareholders, all but six of whom had made the exchange. *Held*, in an action to set aside a release of A.'s mortgage and to foreclose the mortgage, that the letter was admissible to show that the company was at the time transacting business, and that a definite five-year contract existed between the association and its original shareholders.—*Floyd-Jones v. Anderson et al.*, 351.

Insolvency—Creditors.

3. Since building and loan associations do not ordinarily have outside creditors, as do general corporations, a deficiency of assets does not render them insolvent, in the proper sense of the word, but merely indicates a loss of capital stock and security, and depreciation of the stock held by the members.—*Floyd-Jones v. Anderson et al.*, 351.

Cancellation of Debt—Mortgage Released.

4. Where a certificate of stock in a building and loan association provided that the association would pay to a shareholder the sum of \$100 for each share represented thereby at the end of five years, on condition that the shareholder complied with the terms and conditions thereof, and other literature provided that the stock at maturity should cancel the mortgage, the debt of a borrowing member, who complied with all the terms and conditions of his contract, was canceled, and the mortgage which he executed to secure his loan released, at the expiration of five years.—*Floyd-Jones v. Anderson et al.*, 351.

Settlement—Withdrawal of Shareholders—Effect.

5. Where a member of a building and loan association has made full settlement, and withdrawn therefrom, such settlement and withdrawal cannot be set aside by the association without showing fraud or bad faith in some form.—*Floyd-Jones v. Anderson et al.*, 351.

Contract—Powers.

6. Where the contract between a borrowing member and a building and loan association has been completed, and the member has withdrawn, it is immaterial whether the contract was one which the association had the power to make.—*Floyd-Jones v. Anderson et al.*, 351.

BURDEN OF PROOF.

Negligence—Recovery—Assumption of Risk.

1. While, in an action for injuries to a servant, the burden is on the plaintiff to prove that defendant was negligent, and that the injury complained of was the direct or proximate result of the negligence alleged, the burden is on the defendant to show that plaintiff was guilty of such contributory

negligence as would prevent his recovery, or that plaintiff assumed the risk of the employment.—*Nord v. Boston & Mont. Con. C. & S. M. Co.*, 48.

Master and Servant—Contributory Negligence—Assumption of Risk.

2. Though the burden is on the master, in an action for injuries to his servant, to prove contributory negligence or assumption of risk, if the existence of such defense is disclosed by plaintiff's witnesses, defendant is entitled to the same advantage thereof as though proven on his part.—*Nord v. Boston & Mont. Con. C. & S. M. Co.*, 48.

Mines—Rebuttal.

3. Code of Civil Procedure, Section 1080, as amended by Session Laws of 1901, p. 160, provides that the party on whom the burden of the issues rests must first produce his evidence, and the adverse party must then produce his evidence, and that the parties will then be confined to rebutting evidence. In an action by the owners of a mining claim for removal of ore from within its boundaries, the issue was the location of the point at which a certain vein departed from a side line of defendant's location. Defendants, after plaintiffs showed a taking of ore from within their boundaries, introduced evidence that the vein departed at the point as claimed by them. whereupon plaintiffs in rebuttal introduced evidence that the vein departed at the place claimed by them as shown by the fact that the vein was exposed in the cellar of a certain building. *Held*, that it was error not to permit defendants to show in rebuttal that the vein located in the cellar was along a course or strike which would bring it out at a point other than claimed by plaintiffs.—*Maloney v. King et al.*, 158.

Action for Damages—Mines—Removal of Ore.

4. In an action for damages sustained by plaintiffs, owing to the removal of ores from their mining location, plaintiffs having shown *prima facie* the amounts taken, it was then incumbent on defendants to show that they took a less quantity than plaintiffs' proof tended to show.—*Maloney v. King et al.*, 158.

Water Rights—Ownership.

5. Where plaintiffs, in an action to recover damages for the diversion of water adjacent to their mining claim, allege ownership of their right to use the water, the burden of proof is on them to show ownership. on denial of the allegation by defendant.—*Leggat v. Carroll*, 384.

Bailment.

6. In an action against a bailee for hire for failure to redeliver the article as agreed, it having been lost, he has the burden of showing he used ordinary care.—*Shropshire v. Sidebottom*, 406.

Bailment—Negligence.

7. *Obiter*: Where the bailor alleges negligence on the part of the bailee as the basis of the bailor's right to recover, the burden is on the bailor to prove such allegation.—*Shropshire v. Sidebottom*, 406.

Suit to Set Aside Deed—Escrow—Nonsuit.

8. A grantor in a deed placed in escrow, to be delivered in a specified time on the performance of certain conditions, brought suit to set aside the deed. At the close of plaintiff's case, defendant's motion for a nonsuit was granted.

Pleadings and evidence examined, and *held*, that the motion for a nonsuit was rightly granted, since, under the pleadings, the burden of proof was on the plaintiff to prove his material allegations, and this he had failed to do.—*Swain v. McMillan*, 433.

CERTIORARI.

When It Will Lie.

1. Writ lies to annul order of district court setting aside default and judgment entered in justice's court, after appeal, and refusing to dismiss appeal for lack of jurisdiction.—*State ex rel. Cobban v. District Court*, 93.

Same.

2. Writ lies to annul order of district court changing place of trial on its own motion, and over the objection of plaintiff, under provisions of Section 615 of the Code of Civil Procedure, as amended by the second extraordinary session of the Eighth legislative assembly. "In attempting to change the venue" [no motion having been filed] "the court exceeded its jurisdiction."—*State ex rel. Gnose v. District Court*, 188.

CHANGE OF VENUE.

See CONSTITUTION, 5, 11-19.

See DISTRICT JUDGES.

Disqualification of Judges—Motion.

1. Code of Civil Procedure, Section 615, as amended by the second extraordinary session of the Eighth legislative assembly, is mandatory, and the district court must change the venue in the cases prescribed, but only after a motion has been filed, and a showing made as required by the clause of the section invoked. The court cannot act of its own motion.—*State ex rel. Gnose v. District Court*, 188.

Contempt—Disqualification of Judges.

2. Code of Civil Procedure, Sections 180 and 615, as amended by Acts of the second extraordinary session of the Eighth legislative assembly (1903), relating to disqualification of judges and change of venue, have no application to contempt proceedings.—*State ex rel. Boston & Mont. Con. C. & S. M. Co. v. Judges*, 193.

Constitutional Law.

3. Under Constitution, Article VIII, Sections 1, 11, which, as shown by the original draft of the Constitution finally adopted, read, "The judicial power of the state shall be vested in * * * district courts," etc., and that "the district courts shall have original jurisdiction," etc., the district courts are distinct entities, and a transfer of a cause from one district to another amounts to a change of venue.—*State ex rel. Boston & Mont. Con. C. & S. M. Co. v. Judges*, 193.

Disqualification of Judges—Affidavit—When to be Filed.

4. Code of Civil Procedure, Sections 180, 615, as amended by Act of December 10, 1903, providing for the disqualification of district judges on the filing of an affidavit of prejudice, and declaring that a change of venue shall not be granted for that reason if, within thirty days after the filing of the affidavit, another judge shall be called in to try the case, etc., does

not authorize the disqualifying affidavit to be filed after the trial of the case has been begun, after which period no change of venue can be granted.—*State ex rel. Anaconda Copper Mining Co. v. Clancy*, 529.

Denial—Review—Prohibition.

5. An order denying a motion for a change of venue can be reviewed only on appeal from final judgment, and not on an application for a writ of prohibition.—*State ex rel. Durand v. District Court*, 547.

CLAIM AND DELIVERY.

Verdict—In Alternative.

1. In a claim and delivery action the verdict of the jury need not be in the alternative.—*Hynes v. Barnes*, 25.

Judgment—In Alternative.

2. The judgment in a claim and delivery action must be in the alternative.—*Hynes v. Barnes*, 25.

COMMITTING MAGISTRATE.

See JUSTICE OF THE PEACE, 9, 10.

See CRIMINAL LAW, 3.

CONSTITUTION.

List of Sections Cited or Commented Upon.

Article III, Sec. 6.....	543
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Article XII, Sec. 3.....	469
Article XV, Sec. 2.....	504
Article XV, Sec. 12.....	343
Article XV, Sec. 14.....	340

Equal Protection of the Law Discrimination.

1. It is only where persons engaged in the same business are subjected to different restrictions, or are granted different privileges under like conditions, that the discrimination is open to the objection that it is a denial of equal protection of the law.—*City of Butte v. Paltrovich*, 18.

Equal Protection of the Law—Regulating Hours of Business.

2. An ordinance does not deny the equal protection of the law because regulating the hours of operating pawnshops, loan offices, and second-hand stores, only.—*City of Butte v. Paltrovich*, 18.

Location of Mining Claims—State Statutes.

3. *Held*, in view of the former decision of this court, that Political Code, Sections 3610 *et seq.*, providing additional requirements for valid locations of mining claims to those required by the Acts of Congress, are not in violation of the U. S. Constitution and Acts of Congress (though the court entertains serious doubts as to the correctness of its former rulings in this matter).—*Mares v. Dillon*, 117.

Contempt—Injunction.

4. *Obiter*: The court will not decide the question of the constitutionality of a statute, unless the decision of such question is necessary.—*State ex rel Boston & Mont. Con. C. & S. M. Co. v. Judges*, 193.

Change of Venue.

5. Under Constitution, Article VIII, Sections 1. 11, which, as shown by the original draft of the Constitution finally adopted, read, "The judicial power of the state shall be vested in * * * district courts," etc., and that "the district courts shall have original jurisdiction," etc., the district courts are distinct entities, and a transfer of a cause from one district to another amounts to a change of venue.—*State ex rel. Boston & Mont. Con. C. & S. M. Co. v. Judges*, 193.

Taking Property Without Compensation—Mines—Inspection.

6. Under Code of Civil Procedure, Section 1317, requiring the applicant for an inspection of mining property to pay all the expenses of examination, etc., an order requiring defendant to use its appliances to lower and raise plaintiff's agents in making such inspection, and providing the amount to be paid therefor, was not objectionable as taking or damaging defendant's property without just compensation.—*State ex rel. Boston & Mont. Con. C. & S. M. Co. v. Dist. Court*, 206.

Due Process of Law—Municipal Corporations—Street Improvements.

7. Session Laws 1897, p. 219, Section 30, providing that when a street improvement is made the city council shall enact by ordinance that the expense shall be paid by the entire district created as previously provided, according to area, is not unconstitutional as depriving the property owner of his property without due process of law, in that such provision is a legislative declaration that all property in the proposed district is benefited by the improvement, and to the same extent.—*McMillan v. City of Butte*, 220.

Assessments—Taking Property Without Compensation.

8. In the absence of proof that the burden imposed on a property owner by a municipal assessment is altogether out of proportion to the benefit actually accruing to the property, he cannot assert that his property is thereby taken without compensation.—*McMillan v. City of Butte*, 220.

Powers of Legislature—Regular Sessions.

9. When convened in regular session, the power of the legislature to enact laws is plenary, except in so far as the Constitution has limited it.—*State ex rel. Anaconda Copper Mining Co. v. Clancy*, 529.

Legislatures—Extraordinary Session—Governor's Proclamation.

10. In order to determine whether legislation passed at an extraordinary session of the legislature is germane to the subjects specified in the governor's proclamation, as required by Constitution, Article XI, Section 11, it is incumbent on the court to examine the proclamation as a whole, giving to the language used its ordinary meaning, and a rule of liberal interpretation should be applied, to the end that the legislation be operative. —*State ex rel. Anaconda Copper Mining Co. v. Clancy*, 529.

Proclamation of Governor—Extraordinary Session.

11. A proclamation of the governor convened the legislature in extra session in December, 1903, for the purpose of enacting general legislation by which the bias and prejudice of district judges should be made a disqualification of such judges to try any case that may come before them, as well as legislation making suitable provision for the trial of such case or cases in such event. The legislature met and passed the Act of December 10, 1903, amending Code of Civil Procedure, Section 180, so as to provide that in such case, if a qualified judge should be called to try the cause within thirty days after such disqualification, no change of venue therefor should be had. *Held*, that such legislation was germane to the governor's call, as required by Constitution, Article VII, Section 11. *State ex rel. Anaconda Copper Mining Co. v. Clancy*, 529.

District Judges—Disqualification.

12. Act of December 10, 1903, amending Code of Civil Procedure, Section 180, so as to provide for the disqualification of a district judge by the mere filing of an affidavit of prejudice, is not in violation of Constitution, Article VIII, Section 16, providing the qualifications of district judges; such qualifications being limited to qualities necessary to render the person eligible to the office, without application to his qualifications to try particular cases. —*State ex rel. Anaconda Copper Mining Co. v. Clancy*, 529.

District Judges—Disqualification—Change of Venue.

13. Act of December 10, 1903, amending Code of Civil Procedure, Section 180, so as to provide for the disqualification of district judges on the filing of an affidavit of prejudice, thereupon disqualifying him to further act in the case except to arrange his calendar, notify another judge to try the case, or, if he fails to do so within thirty days, to change the place of trial, etc., and amending Section 615, so that, if another judge is called in within such time, the change of venue shall not be granted, does not contravene, but is in harmony with Constitution, Article VIII, Section 12, providing that any judge of the district court may hold court for any other district judge, and shall do so when required by law, since under the statute, both before and after its amendment, a judge can only be secured to preside for another on the invitation of a resident judge.—*State ex rel. Anaconda Copper Mining Co. v. Clancy*, 529.

District Judges—Disqualification—Affidavits—Prejudice.

14. Act of December 10, 1903, amending Code of Civil Procedure, Section 180, providing for the disqualification of district judges on the filing of an affidavit of prejudice, is not in violation of Constitution, Article VIII, Section 11, conferring on district courts original jurisdiction in "all" cases in law and in equity, by reason of the fact that the filing of the affidavit, without a determination of the question of prejudice, deprives the judge of jurisdiction, since it is the imputation of prejudice, and not prejudice in

fact, that constitutes the disqualification, which imputation is not subject to judicial investigation.—*State ex rel. Anaconda Copper Mining Co. v. Clancy*, 529.

District Judges—Disqualification—Notice—Due Process of Law.

15. Act of December 10, 1903, amending Code of Civil Procedure, Section 180, so as to provide for the disqualification of district judges on the filing of an affidavit of prejudice, is not in violation of Constitution of the United States, Amendment XIV, Section 1, nor Constitution of Montana, Article III, Section 27, as depriving a litigant of his property without due process of law, in that no notice required to be given of the filing of the disqualifying affidavit, since, as the mere filing of the affidavit works the disqualification, the giving of notice would serve no purpose. —*State ex rel. Anaconda Copper Mining Co. v. Clancy*, 529.

Right of Trial Before Particular Judge.

16. A litigant has no constitutional right to have his cause tried before a particular judge, hence a party is not deprived of life, liberty or property by the mere fact that he cannot have his cause tried before the judge of the district where the action was commenced.—*State ex rel. Anaconda Copper Mining Co. v. Clancy*, 529.

Disqualification of Judges—Uniform Operation of Laws.

17. Since the Act of December 10, 1903, amending Code of Civil Procedure, Section 180, so as to provide for the disqualification of district judges on the filing of an affidavit of prejudice, is general in its terms and operation throughout the state, and therefore sufficiently complies with Constitution, Article VIII, Section 26, requiring all laws relating to courts to have a uniform operation, it is immaterial that it was passed at an extra session of the legislature, called by the governor for the purpose of relieving an industrial condition existing in only three of the populous cities of the state.—*State ex rel. Anaconda Copper Mining Co. v. Clancy*, 529.

District Judges—Disqualification—Administration of Justice without Delay.

18. Code of Civil Procedure, Section 180, as amended by Act of December 10, 1903, provides for the disqualification of district judges by the filing of an affidavit of prejudice, upon the filing of which the judge is authorized to transfer the cause or call in another judge to try the same. Section 615 authorizes a change of venue where a judge is disqualified, and as amended by the same Act declares that if a judge is disqualified for prejudice, no change shall be granted if another judge is called in to try the cause within thirty days. *Held*, that such amendatory act was not in contravention of Constitution, Article III, Section 6, guarantying administration of justice without delay, in that it permits a party filing a disqualifying affidavit to prevent further action in case the disqualified judge will not call in another judge, since in that event the opposite party would at once be entitled to a change of venue under Section 615.—*State ex rel. Anaconda Copper Mining Co. v. Clancy*, 529.

Same.

19. Act of December 10, 1903, amending Code of Civil Procedure, Section 180, authorizing each party to a suit to disqualify five district judges by filing an affidavit of prejudice, could not be held in contravention of Constitution, Article III, Section 6, guarantying the administration of justice without delay, though it authorizes the successive disqualification of two

thirds of the district judges in the state, in the absence of a showing that the "necessary" consequence of the enforcement of the act will be to deny litigants a speedy trial.—*State ex rel. Anaconda Copper Mining Co. v. Clancy*, 529.

Validity of Legislative Enactments.

20. Before the court will declare solemn legislative enactments invalid, their unconstitutionality must be established beyond a reasonable doubt.—*State ex rel. Anaconda Copper Mining Co. v. Clancy*, 529.

Unwise or Vicious Legislation—Validity.

21. Courts cannot hold legislation invalid merely because it is unwise, or under it great wrongs may be perpetuated, or even because the measure itself is vicious.—*State ex rel. Anaconda Copper Mining Co. v. Clancy*, 529.

District Judges—Disqualification—Bias and Prejudice.

22. Act of December 10, 1903, amending Code of Civil Procedure, Section 180, making the filing of an affidavit of prejudice a ground of disqualification of a district judge, is not unconstitutional.—*State ex rel. Durand v. District Court*, 547.

CONTEMPT.

Injunction—Mines—Evidence.

1. In a proceeding to punish for contempt in violating an injunction restraining defendants from working mining properties decreed to be the property of plaintiff, much of the evidence to show that the properties on which defendants worked belonged to plaintiff was speculative, and based on projections made on conclusions from facts observed in workings remote from the points in controversy. Held not sufficient to sustain a conviction. *State ex rel. Boston & Mont. Con. C. & S. M. Co. v. District Court*, 96.

Mining Property—Title to Veins.

2. Contempt proceedings for violation of an injunction restraining trespasses on mining property cannot be resorted to for the purpose of determining the title to veins, the ownership of which was not determined in the injunction suit.—*State ex rel. Boston & Mont. Con. C. & S. M. Co. v. District Court*, 96.

Distinct Action—Injunction.

3. *Obiter*: A proceeding in contempt to punish for the violation of an injunction, is distinct from the action wherein the injunction violated was issued.—*State ex rel. Boston & Mont. Con. C. & S. M. Co. v. Judges*, 193.

Constitutionality of Statute.

4. *Obiter*: The court will not decide the question of the constitutionality of a statute, unless the decision of such question is necessary.—*State ex rel. Boston & Mont. Con. C. & S. M. Co. v. Judges*, 193.

Disqualification of Judges—Change of Venue.

5. Code of Civil Procedure, Sections 180 and 615, as amended by Acts of the Second extraordinary session of the Eighth legislative assembly (1903), relating to disqualification of judges and change of venue, have no application to contempt proceedings.—*State ex rel. Boston & Mont. Con. C. & S. M. Co. v. Judges*, 193.

Proceedings—Criminal Nature.

6. Contempt proceedings are of a criminal nature.—*State ex rel. Boston & Mont. Con. C. & S. M. Co. v. Judges*, 193.

Reasonable Doubt.

7. *Obiter*: In contempt proceedings the evidence must show that the accused party is guilty beyond a reasonable doubt.—*State ex rel. Boston & Mont. Con. C. & S. M. Co. v. Judges*, 193.

Power of Court—Statutes.

8. The power to punish for contempt is inherent in the district courts, and exists independently of statutes, and cannot be taken away or so far abridged by the legislature as to leave such courts without proper and vigorous means of protecting themselves from insult or of actually enforcing their lawful orders.—*State ex rel. Boston & Mont. Con. C. & S. M. Co. v. Judges*, 193.

Disqualification of Judge—Affidavit—Application.

9. Act of December 10, 1903, amending Code of Civil Procedure, Section 180, making the filing of an affidavit of prejudice a ground of disqualification of a district judge, has no application to a motion to strike the answer of a defendant from the files, which was treated by both parties as a proceeding in contempt.—*State ex rel. Durand v. District Court*, 547.

CONTINUANCE.

Engagements of Counsel—Affidavits—Sufficiency.

1. Where it appeared from the record that defendant had three counsel, two of whom were partners, an affidavit for a continuance until after a certain date, which stated that counsel who was to try the case was to be engaged in the supreme court on the day set for trial and the two following days, but which failed to show any reason why his partner could not attend to the business in the supreme court, or why the other counsel could not try the case, was insufficient to show error in the refusal of the continuance.—*York v. Steward*, 363.

Criminal Law—Discretion of Trial Court.

2. The granting or refusing of a motion for a continuance in a criminal case is within the sound discretion of the trial court.—*State v. Howard*, 518.

Appeal—Abuse of Discretion.

3. The action of the trial court in refusing or allowing a continuance will not be interfered with on appeal unless there has been an abuse of discretion.—*State v. Howard*, 518.

CONTRACT.

Construction of Lease—Liability for Rent—Occupancy.

1. Under the first paragraph of the *habendum* clause, the property was leased to defendant for the full term of two years, unless the lease was sooner forfeited. It then provided that the lessee should pay the lessor, as rent for the premises, \$150 per month "during occupancy" thereof, and that, should the lessee fail to make such payments, the lessor might re-

enter without this working a forfeiture of the rents to be paid, and that the lessee should not sublet, and should surrender the property "at the expiration of the time herein recited." *Held*, that "during occupancy" meant "while possession continues," that is, during the whole term; so that the lessee could not, before expiration of the term, surrender possession and relieve himself from liability for further rent.—*Bickford v. Kirwin*, 1.

Conflicting Evidence—Finding Conclusive.

2. Where the evidence was conflicting as to whether there was a contract, the jury's finding is conclusive.—*McMillan v. Frank*, 61.

Verbal Agreement—Merger in Written Contract.

3. Civil Code, Section 2186, provides that the execution of a contract in writing, whether required to be in writing or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied its execution, and hence evidence of negotiations and conversations immediately preceding the execution of a written contract is incompetent to show an agreement concerning its matter made by one claimed to be bound thereby.—*Largey v. Leggat*, 148.

Attorney in Fact—Signature to Contract.

4. One who signs a contract only as attorney in fact for a party thereto is not bound by the contract, and it has the same effect, so far as an action against him based thereon is concerned, as if the party had signed only his own name thereto.—*Largey v. Leggat*, 148.

Oral Agreement—Statute of Frauds.

5. An oral agreement by a purchaser at a judicial sale to take the deed in his own name, and convey to another, is void, as within the statute of frauds (Civil Code, Section 2342).—*Largey v. Leggat*, 148.

Statute of Frauds.

6. The agreement cannot be taken out of the statute, and enforced against the purchaser as a trustee *ex maleficio*, to prevent the perpetration of a fraud, where neither party had any interest in the property, and no money was advanced to the purchaser, or anything done towards carrying the agreement into effect.—*Largey v. Leggat*, 148.

Judgment Creditors—Third Party.

7. An agreement whereby judgment creditors agreed that the judgment should not be enforced till a claim of a third party against them was settled was too indefinite as to time to be enforceable.—*Burton v. Kipp*, 275.

Judgment Creditors—Third Party—Consideration.

8. An agreement not to enforce a judgment till a claim of a third party against the judgment creditor should be settled was based on no consideration.—*Burton v. Kipp*, 275.

Lost Instrument—Proof of Execution and Contents.

9. Under the provisions of the Code of Civil Procedure, in order to establish the former existence of an instrument in writing, under which plaintiff claims, he is compelled to prove its execution and contents, including all the substantial parts of the lost instrument, to such an extent as to constitute a practical reproduction of the instrument in all of its substantial parts.—*Capell et al. v. Fagan*, 507.

Lost Instrument—Proof—Competency.

10. Proof of negotiations, conversations and acts of parties before, at the time of and after the execution of a written instrument, are not competent to prove its contents where the instrument is lost.—*Capell et al. v. Fagan*, 507.

Lost Instrument—Parol Testimony.

11. Where a written contract is to be proved by parol testimony, no vague, uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself, but the substance of the agreement must be proved satisfactorily.—*Capell et al. v. Fagan*, 507.

Consideration—Proof.

12. While, under the statutes, the consideration need not be mentioned in a deed, yet, if it is mentioned and set forth in the deed, it becomes a substantial part of the contents thereof, and must be proven like any other of the contents on loss thereof.—*Capell et al. v. Fagan*, 507.

CORPORATIONS.

Action Against Officers—Misappropriation of Funds.

1. Though a corporation is necessarily made a party to an action against its officers for fraudulently diverting and misappropriating its funds, and though the action is brought in the name of the plaintiffs, who are minority stockholders, it is in reality on behalf of the corporation.—*McConnell et al. v. Combination M. & M. Co.*, 239.

Minority Stockholders—Fraud—Condition Precedent to Action.

2. Demand on the officials of a corporation to bring suit for fraud of officers and directors in misappropriating its funds is not a condition precedent to action by the minority stockholders.—*McConnell et al. v. Combination M. & M. Co.*, 239.

Complaint—Sufficiency—Officers—Fraud.

3. Though the allegations of the complaint in an action against the officers and directors of a corporation for fraudulently diverting and misappropriating its funds are not sufficient to entitle the action to be considered as brought on behalf of others than plaintiffs, who are minority stockholders, its sufficiency as an action in plaintiffs' own behalf is not impaired by averments that they bring it for others as well as themselves.—*McConnell et al. v. Combination M. & M. Co.*, 239.

Powers—Political—*Ultra Vires*.

4. Where a statute authorizes the organization of corporations thereunder for general mining purposes, but does not specify as one of the objects donations for political purposes, such donations are *ultra vires*.—*McConnell et al. v. Combination M. & M. Co.*, 239.

Stockholders—Officers—Ratification—Estoppel.

5. Though the majority stockholders of a corporation sanction the acts of its directors and officials in illegally making expenditures of the corporate funds, so as to bind themselves by estoppel, yet such acts are not binding on stockholders who neither took part in the proceedings, nor sanctioned.

by act or acquiescence, the making of the expenditures.—*McConnell et al. v. Combination M. & M. Co.*, 239.

Salaries of Officers—Powers of Directors.

6. In the absence of power emanating from the stockholders, from statute, or from by-laws legally adopted, directors of a corporation have no authority to vote a salary to any of their number.—*McConnell et al. v. Combination M. & M. Co.*, 239.

Salaries of Officers—By-Laws—Fraud.

7. A resolution of four directors of a corporation voting three of their number salaries, and giving them back pay, predicated on by-laws previously passed by five directors, including the first mentioned four, is void, under Civil Code, Sections 2970-2976, providing that in all matters connected with his trust a trustee is bound to act in the highest good faith toward his beneficiary, and declaring that every violation of the provisions of the article is a fraud against the beneficiary.—*McConnell et al. v. Combination M. & M. Co.*, 239.

Removal of Office Beyond State—*Ultra Vires*.

8. Compiled Statutes of 1887, Fifth Division, Section 449, provides that, if a company is organized under that chapter for the purpose of carrying on any part of its business outside the state, the certificate shall so state, and shall also name the locality in the state where its principal place of business is located. *Held*, that the removal of the entire official business of a domestic corporation beyond the state, and acts of the directors in attempting to hold regular monthly meetings and to sit as the board of directors in another state, are *ultra vires*.—*McConnell et al. v. Combination M. & M. Co.*, 239.

Officers—Fraud—*Ultra Vires*—Ratification—Insufficiency.

9. In an action against the officers and directors of a corporation for fraudulently diverting and misappropriating its funds, it appeared that, during a period of time in which the official business of the company had been removed from the state without authority of law, stockholders' meetings were held annually in the state for the purpose only of electing directors, at which a majority of the stock was represented. At each of these meetings a resolution was passed approving all acts of the directors and officers for the past year. None of the acts of which plaintiffs complain were presented at these meetings. The board of directors, after the suit was brought, at a regular meeting held in the state, passed a resolution ratifying the acts done without the state; some of the defendants voting for and causing its adoption. *Held* insufficient to show a ratification of the *ultra vires* acts.—*McConnell et al. v. Combination M. & M. Co.*, 239.

Officers—Illegal Acts—Laches.

10. Where a series of illegal acts by a corporation's officers and directors, continuing over a period of several years, is pursued till the commencement of an action against the officers and directors therefor by minority stockholders, laches cannot be predicated of the plaintiffs' delay in bringing suit.—*McConnell et al. v. Combination M. & M. Co.*, 239.

By-Laws—Evidence—Admissibility.

11. Under Code of Civil Procedure, Section 3130, providing that, when part of a writing is given in evidence by one party, the whole on the same subject may be inquired into by the other, the act of plaintiffs, in an action

against the officers and directors of a corporation for fraudulently diverting and misappropriating the corporate funds, in first introducing some insufficiently identified by-laws, though denying the legality of their adoption, renders the others admissible on behalf of the defendants.—*McConnell et al. v. Combination M. & M. Co.*, 239.

Liability of Officers—Misappropriation of Funds.

12. Where the secretary of a corporation, who is unlawfully paid a salary by the directors, is not a director, and is connected in no way with the fraudulent transactions of the directors in misappropriating and diverting the corporate funds, he cannot be held liable in an action by minority stockholders against the officers and directors for relief against the fraudulent acts, but the officials who caused the money to be paid to him must account therefor.—*McConnell et al. v. Combination M. & M. Co.*, 239.

Telephone Lines—Municipal Corporations—Streets.

13. Civil Code, Section 1000, authorizes telephone corporations to construct their lines along and upon the streets of cities, since the term "public roads" includes "streets" of cities.—*State ex rel. R. M. Bell Tel. Co. v. Mayor et al.*, 338.

Statutes—Foreign-- Domestic.

14. Civil Code, Section 1000, applies as well to foreign corporations which have complied with the statute prescribing the conditions on which foreign corporations may do business in the state, as to domestic corporations.—*State ex rel. R. M. Bell Tel. Co. v. Mayor et al.*, 338.

Mining—Sale of Corporate Property.

15. In a suit by a minority stockholder of a mining corporation to restrain the sale of the corporate property, *held*, as to a mining corporation organized between 1880 and 1898, the authority conferred on such corporation to sell its property by Laws of 1890, page 113 (commonly known as "House Bill 132"), was not violative of the Federal Constitution (Art. I, Section 10) and the Constitution of the State of Montana (Art. III, Section 11), as impairing the obligation of contracts.—*Allen v. Ajax Mining Co. et al.*, 490.

Manner of Proving Organization.

16. The organization of a corporation under the state law was properly proved by a copy of its certificate of incorporation, certified by the secretary of state, under Code of Civil Procedure, Section 3207.—*Western Iron Works v. Montana Pulp & Paper Co.*, 550.

COSTS.

Incident to Filing Adverse Claims to Mining Location—Not Taxable.

1. Disbursements for filing an adverse claim to a mining location in the land office for surveying, the making of a plat, and for an abstract of title for use in the land office, were not taxable as costs under Code of Civil Procedure, Section 1866, authorizing taxation of disbursements for matters to be used in the trial of the cause.—*Marcus v. Dillon*, 144.

Appeal.

2. An appeal does not lie from an order taxing costs, but the error, if any, may be considered on appeal from the judgment.—*Marcus v. Dillon*, 144.

Refusal—Appeal from Order.

3. An order refusing to allow costs is not reviewable, except on appeal from the judgment.—*Musigbrod v. Hartford*, 273.

Dismissal of Action by Plaintiff.

4. Under Code of Civil Procedure, Section 1004, Subdivision 1, the payment of defendant's costs is not a prerequisite to the exercise of plaintiff's right to dismiss the action.—*Miller v. Northern Pacific Ry. Co.*, 289.

Dismissal of Action by Plaintiff—Jurisdiction.

5. When a plaintiff at any time before trial files a *praecipe* with the clerk for the dismissal of the action, and the dismissal has been entered on the register of actions, the case is dismissed, and has passed beyond the jurisdiction of the court, save for the sole purpose of entering a judgment for costs in favor of defendant under Section 1008, Code of Civil Procedure.—*Miller v. Northern Pacific Ry. Co.*, 289.

COUNTIES.

Powers—Quasi-Corporate in Character.

1. A county is one of the civil divisions of the state for political and judicial purposes, created by the sovereign power of the state of its own will, without the consent of the people who inhabit it; it is quasi-corporate in character, but has only such powers as are expressly provided by law or are necessarily implied by those expressed.—*Independent Pub. Co. v. County of Lewis and Clarke*, 83.

Liability for Printing Briefs—Appeal.

2. After a criminal case has been appealed to the supreme court, the duties of the county attorney therein and his power to contract expenses for the county cease, and the duty of the attorney general begins, and, there being no Code provision authorizing it, he has no power to contract on behalf of the county, and the county has no power lawfully to pay, expenses incurred in printing briefs filed on behalf of the state in the appeal.—*Independent Pub. Co. v. County of Lewis and Clarke*, 83.

CRIMINAL LAW.

Bail Bond.

1. Though a defendant is released on bail, if the bond was not lawfully required, it is *nudum pactum*.—*State v. Lagoni et al.*, 472.

Bail Bond—Forfeiture.

2. Where, in an action on a bail bond, it was shown that an information was filed against the defendant, charging him with a crime, and that he failed to appear and answer, and that the court thereupon ordered the bond forfeited, a contention that the state did not prove that an order of forfeiture was made was without merit.—*State v. Lagoni et al.*, 472.

Committing Magistrate—Bail Bond—Sureties.

3. The fact that a magistrate made a verbal order of release, instead of complying with Penal Code, Section 2354, was no defense to a surety in an action on the bail bond.—*State v. Lagoni et al.*, 472.

Insanity—Proof—Reputation.

4. Insanity cannot be proved by reputation.—*State v. Lagoni et al.*, 472.

Information—Charging One Under Aliases.

5. Where an information was against one as George Howard, alias James Howard, alias Joe Kirby, a contention that the information did not conform to the requirements of Sections 1832 and 1834, Penal Code, is without merit; the information having charged his prior conviction, and the different names being for the purpose of identifying him as the person previously convicted.—*State v. Howard*, 518.

Information—Robbery.

6. An information on a prosecution for robbery which charged that the property was taken by means of force and putting in fear, and that it was taken from the person and possession and from the immediate presence of a specified person, did not charge more than one offense.—*State v. Howard*, 518.

Continuance—Discretion.

7. The granting or refusing of a motion for a continuance in a criminal case is within the sound discretion of the trial court.—*State v. Howard*, 518.

Jurors—Defense of Insanity—Prejudice.

8. Where jurors state on their *voir dire* examination that they were prejudiced against the defense of insanity, but upon further examination say that they would treat it like any other defense; would follow the court's instructions thereon, and, if the instructions should in any manner differ from their own ideas, they would follow the instructions, they have qualified themselves as competent jurors.—*State v. Howard*, 518.

Jurors—Reading Newspapers—Opinion.

9. Where a venireman in a criminal case stated on his *voir dire* that he had read the newspaper accounts of the alleged robbery, and had formed an opinion, but not a fixed one, and on re-examination he said he could entirely discard the opinion thus formed, and give the defendant as fair a trial as if he had never heard of the case, he was competent.—*State v. Howard*, 518.

Robbery—Evidence—Conspiracy.

10. Where defendant, while engaged in attempting to rob the safe on a train, robbed a mail clerk, on a prosecution for the robbery of the mail clerk it was proper to admit evidence as to all the details of the attempted robbery of the train, and a conspiracy therefor.—*State v. Howard*, 518.

Evidence—Letters—Handwriting—Identification.

11. Where, on a criminal prosecution, the state offered in evidence a letter claimed to have been written by accused, and a witness testified that he was familiar with defendant's handwriting, and that the letter looked like his writing, and that the signature was his signature, there was a sufficient identification of the letter as one written by defendant.—*State v. Howard*, 518.

Evidence—Insanity—Letters—Harmless Error.

12. Where a letter improperly admitted was immaterial, and the only defense made in the case was insanity, the admission of the letter was harmless error.—*State v. Howard*, 518.

Evidence—Admissibility—Prejudicial Error.

13. In a criminal case, error in the admission of evidence, to secure a reversal of a judgment of conviction, must be prejudicial to the defendant.—*State v. Howard*, 518.

Commitment—Evidence—Identification of Defendant.

14. Where the warden of the penitentiary testified that defendant had been confined in the penitentiary, and there was admitted in evidence a commitment against him, and it appeared that the date of his commitment and release corresponded with the requirements of the commitment, and other witnesses testified that they knew defendant when he was in the penitentiary, an objection that defendant was not identified as the man to whom the commitment referred was of no merit.—*State v. Howard*, 518.

Prior Conviction—Manner of Proving.

15. The proper manner of proving a prior conviction is not by the introduction of the commitment, but by the record of the judgment. (Code of Civil Procedure, Sec. 3193.)—*State v. Howard*, 518.

Robbery—Insanity—Cross-Examination.

16. Where, on a prosecution for robbery, a witness on direct examination testified that he had been confined in the penitentiary, and that he had known the defendant for about fifteen months, and had observed his demeanor at the penitentiary, and that he thought defendant insane, questions put to him on cross-examination for the purpose of showing that he was a member of the conspiracy which resulted in the robbery were not improper, as exceeding the proper limits of cross-examination.—*State v. Howard*, 518.

Robbery—Insanity—Intent.

17. On a prosecution for robbery, the question whether defendant was, by reason of insanity, incapable of having the criminal intent necessary to the commission of the crime, was raised by a plea of not guilty.—*State v. Howard*, 518.

Robbery—Evidence of Ownership of Money Taken.

18. On a prosecution for robbery, the fact that the money taken was in prosecutor's possession is sufficient evidence of ownership to sustain a conviction.—*State v. Howard*, 518.

Robbery—Insanity—Intent—Question of Fact.

19. On a prosecution for robbery, the question whether defendant was, by reason of insanity, incapable of having the criminal intent necessary to the commission of the crime, was a question of fact for the jury.—*State v. Howard*, 518.

Insanity.

20. Penal Code, Section 2521, provides that when an action is called for trial, or at any time during a trial, or when the defendant is brought up

for judgment, if a doubt arises as to the sanity of defendant, the court must order the question as to his sanity to be submitted to a jury. *Held*, that the doubt mentioned in the statute is one arising in the mind of the judge, and one which he must determine.—*State v. Howard*, 518.

CROSS-EXAMINATION.

Improper—Action to Recover Money Loaned.

1. In an action to recover an alleged loan it appeared that plaintiff had been employed by defendant's firm, and had been paid a certain compensation, and that he had borrowed a sum of money from the firm, which he had afterwards repaid. Defendant sought to show by cross-examination of plaintiff's wife that plaintiff's statement of the amount received by him for the labor was not true, and that plaintiff had secured \$50 from defendant to send witness to Chicago, and at that time had no money. *Held* improper cross-examination.—*Smith v. Shook*, 30.

Robbery—Insanity—Conspiracy—Proper Limits.

2. Where, on a prosecution for robbery, a witness on direct examination testified that he had been confined in the penitentiary, and that he had known the defendant for about fifteen months, and had observed his demeanor at the penitentiary, and that he thought defendant insane, questions put to him on cross-examination for the purpose of showing that he was a member of the conspiracy which resulted in the robbery were not improper, as exceeding the proper limits of cross-examination.—*State v. Howard*, 518.

Criminal Law—Question Tending to Degrade Witness.

3. Where a witness for defendant had testified that he had been in the penitentiary, and that he was then in jail, a question put to him on cross-examination as to whether he was not in jail on a charge of holding up a saloon was not erroneous, as tending to degrade the witness. The question was not prejudicial, as not proper cross-examination.—*State v. Howard*, 518.

DEEDS.

When Mortgage—Release.

1. Where a deed absolute on its face is given as security for a debt, and the grantee gives bond for a reconveyance on payment of the debt, the transaction is a mortgage, which the debtor is entitled, on payment of the debt, to have released by reconveyance.—*Grogan v. Valley Trading Co.*, 229.

When Mortgage—Equity Jurisdiction.

2. Where a deed absolute on its face was given as security for a debt, in an action to redeem, the court of equity will determine plaintiff's right of possession, where the defendant makes no claim to possession except under the deed.—*Grogan v. Valley Trading Co.*, 229.

Findings—Harmless Error.

3. The error in a finding that a deed was executed December 16, 1893, where, under the facts admitted, it was executed "on or about April 19, 1893," was harmless.—*Grogan v. Valley Trading Co.*, 229.

Execution Sales—Validity—Seal of Court—Defect in Writ.

4. A sale made under an execution defective by reason of its failure to contain the seal of the court is validated by the Act of March 2, 1899

(Session Laws of 1899, p. 145), providing that all judicial sales of real property previously made to satisfy valid judgments shall be sufficient to sustain a sheriff's deed based on the sale, and all defects in the issuance of execution shall be disregarded.—*Burton v. Kipp*, 275.

Escrow—Nonsuit—Burden of Proof.

5. A grantor in a deed placed in escrow, to be delivered in a specified time on the performance of certain conditions, brought suit to set aside the deed. At the close of plaintiff's case, defendant's motion for a nonsuit was granted. Pleadings and evidence examined, and *held*, that the motion for a nonsuit was rightly granted, since, under the pleadings, the burden of proof was on the plaintiff to prove his material allegations, and this he had failed to do.—*Swain v. McMillan*, 433.

Lost Instrument—Contents—Proof—Insufficiency.

6. In an action to recover a portion of a mining claim, in which plaintiffs claimed under a deed which had been destroyed, evidence considered, and *held* not to show the contents of the deed by such direct and positive evidence as to enable the court to say that there was a conveyance.—*Capell et al. v. Fagan*, 507.

DISBARMENT.

See ATTORNEYS, 11.

DISTRICT COURTS.

See, also, DISTRICT JUDGES.

Mandamus—Substitution of Attorneys—Discretion.

1. Where, from the facts stated on an application for the substitution of attorneys, it was the plain legal duty of the court to grant the application, and it was without its proper discretion to refuse the same, the applicant was entitled to *mandamus* to compel the court to grant such application.—*State ex rel. Davis v. District Court*, 8.

Appellate Jurisdiction—Limitation.

2. The district court, sitting as an appellate court, is one of limited jurisdiction, and may only proceed in the manner and to the extent provided by law.—*Clark v. Great Northern Ry. Co.*, 458.

Injunction Pendente Lite—Discretion.

3. The granting of an injunction *pendente lite* is within the discretion of the trial court, and, in the absence of a clear abuse of it, the supreme court will not interfere.—*Heinze et al. v. Boston & Mont. Con. C. & S. M. Co.*, 484.

DISTRICT JUDGES.

See, also, DISTRICT COURTS.

Disqualification—Prejudice.

1. Act of December 10, 1903, amending Code of Civil Procedure, Section 180, so as to provide for the disqualification of a district judge by the mere filing of an affidavit of prejudice, is not in violation of Constitution, Article VIII, Section 16, providing the qualifications of district judges; such quali-

fications being limited to qualities necessary to render the person eligible to the office, without application to his qualifications to try particular cases.—*State ex rel. Anaconda Copper Mining Co. v. Clancy*, 529.

Disqualification—Prejudice—Change of Venue.

2. Act of December 10, 1903, amending Code of Civil Procedure, Section 180, so as to provide for the disqualification of district judges on the filing of an affidavit of prejudice, thereupon disqualifying him to further act in the case except to arrange his calendar, notify another judge to try the case, or, if he fails to do so within thirty days, to change the place of trial, etc., and amending Section 615, so that, if another judge is called in within such time, the change of venue shall not be granted, does not contravene, but is in harmony with Constitution, Article VIII, Section 12, providing that any judge of the district court may hold court for any other district judge, and shall do so when required by law, since under the statute, both before and after its amendment, a judge can only be secured to preside for another on the invitation of a resident judge.—*State ex rel. Anaconda Copper Mining Co. v. Clancy*, 529.

Disqualification—Constitution—Prejudice.

3. Act of December 10, 1903, amending Code of Civil Procedure, Section 180, providing for the disqualification of district judges on the filing of an affidavit of prejudice, is not in violation of Constitution, Article VIII, Section 11, conferring on district courts original jurisdiction in "all" cases in law and in equity, by reason of the fact that the filing of the affidavit, without a determination of the question of prejudice, deprives the judge of jurisdiction, since it is the imputation of prejudice, and not prejudice in fact, that constitutes the disqualification, which imputation is not subject to judicial investigation.—*State ex rel. Anaconda Copper Mining Co. v. Clancy*, 529.

Jurisdiction—Discretion.

4. The legislature may deprive a court of discretion in the exercise of its jurisdiction.—*State ex rel. Anaconda Copper Mining Co. v. Clancy*, 529.

Disqualification—Prejudice—Affidavits—Notice.

5. Act of December 10, 1903, amending Code of Civil Procedure, Section 180, so as to provide for the disqualification of district judges on the filing of an affidavit of prejudice, is not in violation of Constitution of the United States, Amendment XIV, Section 1, nor Constitution of Montana, Article III, Section 27, as depriving a litigant of his property without due process of law, in that no notice is required to be given of the filing of the disqualifying affidavit, since, as the mere filing of the affidavit works the disqualification, the giving of notice would serve no purpose.—*State ex rel. Anaconda Copper Mining Co. v. Clancy*, 529.

Right of Trial Before Particular Judge.

6. A litigant has no constitutional right to have his cause tried before a particular judge, hence a party is not deprived of life, liberty or property by the mere fact that he cannot have his cause tried before the judge of the district where the action was commenced.—*State ex rel. Anaconda Copper Mining Co. v. Clancy*, 529.

Disqualification—Uniform Operation of Laws—Constitution.

7. Since the Act of December 10, 1903, amending Code of Civil Procedure, Section 180, so as to provide for the disqualification of district judges on

the filing of an affidavit of prejudice, is general in its terms and operation throughout the state, and therefore sufficiently complies with Constitution, Article VIII, Section 26, requiring all laws relating to courts to have a uniform operation, it is immaterial that it was passed at an extra session of the legislature, called by the governor for the purpose of relieving an industrial condition existing in only three of the populous cities of the state.—*State ex rel. Anaconda Copper Mining Co. v. Clancy*, 529.

Bias and Prejudice—Fair Trial.

8. Code of Civil Procedure, Section 180, as amended by Act of December 10, 1903, provides "that any justice, judge or justice of the peace must not sit or act as such in any action or proceeding when the other party makes and files an affidavit that he had reason to believe and does believe he cannot have a fair trial before a district judge by reason of the bias or prejudice of such judge." *Held* that, though such action as amended was defective in declaring that a "justice" of the supreme court or a justice of the peace should not act as such in any case in the district court, it would be assumed that the word "judge" in the first sentence referred to district judge, and the words "justice" and "justice of the peace" would be disregarded.—*State ex rel. Anaconda Copper Mining Co. v. Clancy*, 529.

Disqualification—Affidavit When to be Filed—Change of Venue.

9. Code of Civil Procedure, Sections 180, 615, as amended by Act of December 10, 1903, providing for the disqualification of district judges on the filing of an affidavit of prejudice, and declaring that a change of venue shall not be granted for that reason if, within thirty days after the filing of the affidavit, another judge shall be called in to try the case, etc., does not authorize the disqualifying affidavit to be filed after the trial of the case has been begun, after which period no change of venue can be granted.—*State ex rel. Anaconda Copper Mining Co. v. Clancy*, 529.

Disqualification—Constitution.

10. Act of December 10, 1903, amending Code of Civil Procedure, Section 180, authorizing each party to a suit to disqualify five district judges by filing an affidavit of prejudice, could not be held in contravention of Constitution, Article III, Section 6, guarantying the administration of justice without delay, though it authorizes the successive disqualification of two-thirds of the district judges in the state, in the absence of a showing that the "necessary" consequence of the enforcement of the act will be to deny litigants a speedy trial.—*State ex rel. Anaconda Copper Mining Co. v. Clancy*, 529.

Disqualification—Bias—Constitution—Change of Venue.

11. Code of Civil Procedure, Section 180, as amended by Act of December 10, 1903, provides for the disqualification of district judges by the filing of an affidavit of prejudice, upon the filing of which the judge is authorized to transfer the cause or call in another judge to try the same. Section 615 authorizes a change of venue where a judge is disqualified, and as amended by the same act declares that if a judge is disqualified for prejudice, no change shall be granted if another judge is called in to try the cause within thirty days. *Held*, that such amendatory act was not in contravention of Constitution, Article III, Section 6, guarantying administration of justice without delay, in that it permits a party filing a disqualifying affidavit to prevent further action in case the disqualified judge will not call in another judge, since in that event the opposite party would at once be entitled to a change of venue under Section 615.—*State ex rel. Anaconda Copper Mining Co. v. Clancy*, 529.

Affidavit of Disqualification—Constitutionality.

12. Act of December 10, 1903, amending Code of Civil Procedure, Section 180, making the filing of an affidavit of prejudice a ground of disqualification of a district judge, is not unconstitutional.—*State ex rel. Durand v. District Court*, 547.

Disqualification—Application—Contempt Proceedings.

13. Act of December 10, 1903, amending Code of Civil Procedure, Section 180, making the filing of an affidavit of prejudice a ground of disqualification of a district judge, has no application to a motion to strike the answer of a defendant from the files, which was treated by both parties as a proceeding in contempt.—*State ex rel. Durand v. District Court*, 547.

Disqualification—Prejudice.

14. Act of December 10, 1903, amending Code of Civil Procedure, Section 180, makes the filing of an affidavit of prejudice disqualify the judge, hence a motion for a change of judge on that ground is improper.—*State ex rel. Durand v. District Court*, 547.

DIVORCE.

Desertion—Adultery—Attorney's Fee—Suit Money—Abuse of Discretion.

1. Where, in an action for divorce, plaintiff alleged that his wife had been guilty of desertion and adultery, which she denied, and, on her application for suit money and attorney's fees, it appeared that plaintiff had property of the value of \$60,000, and it was uncontradicted that a much larger sum than \$200 was necessary to enable defendant to properly prepare her defense, together with her cause of action for a divorce on the ground of desertion and extreme cruelty, alleged in a cross-bill, an order denying defendant's application for attorney's fees, and allowing only \$200 for suit money, was an abuse of discretion.—*Bordeaux v. Bordeaux*, 36.

Reconciliation—Implied Findings—Issues.

2. Where, in a suit for divorce on the ground of adultery, plaintiff's wife, by way of recrimination, alleged cruelty and desertion on the part of plaintiff, which he denied by replication, and the jury specifically found against defendant on all the issues in the case, but the court adopted only certain findings returned by the jury—all of which related to the adultery of defendant, and, of its own motion, set aside and refused to adopt all the further findings, and granted plaintiff a divorce, without making any express findings on the issues raised by defendant's answer,—the judgment on appeal will be reversed as not supported by the findings, notwithstanding the prevalence of the doctrine of implied findings.—*Bordeaux v. Bordeaux*, 36.

Condonation—Adultery.

3. Held, in an action for divorce on the ground of a wife's adultery, that where plaintiff's witnesses informed him of such adultery within two or three days after its occurrence, on December 23, 1897, and, notwithstanding such knowledge, he continued to live with defendant as his wife until January 26, 1898, occupying the same room with her, in which there was but one bed, etc., he thereby condoned her offense, and was not entitled to a divorce by reason thereof.—*Bordeaux v. Bordeaux*, 36.

Custody of Children—Powers of Court.

4. Under Civil Code, Section 192, providing that in an action for divorce the court may, before or after judgment, give such direction for the custody of the children as may seem necessary or proper, and may at any time vacate or modify the same, the court should, of its own motion, where the parents make no petition, inquire into the facts and make the necessary order for the custody of the children, and must do so when moved by either party, irrespective of whether such party was in default, or not, in the suit, or whether he or she was the guilty party; and, if a mistake is made in the first instance, the court should remedy the same, on a proper showing, as soon thereafter as possible.—*Pearce v. Pearce*, 269.

EQUITY.**Adverse Claims—Mines.**

1. U. S. Rev. St. Sec. 2326, as amended by Act March 3, 1881, c. 140, 21 Stat. 505 (U. S. Comp. St. 1901, p. 1430), providing that, if title to the ground in controversy in an action to establish an adverse claim to a mining location shall not be established by either party, the jury shall so find, does not require that such finding should be by a jury, where the suit to determine the adverse claim is in equity.—*Mares v. Dillon*, 117.

Mines—Adverse Claims—Possession.

2. Code of Civil Procedure, Section 1310, provides that an action may be brought by any person against another, who claims an estate or interest in real property adverse to him, to determine such adverse claim; and Section 1322 declares that, in an action to determine the respective rights of claimants to the possession of a mining claim, it is immaterial which party is in possession, and that it is sufficient if it appears from the pleadings that an application for a patent has been made and an adverse claim filed and allowed, and requires the verdict or decision to find which party is entitled to possession of the premises. *Held*, that where the complaint in an action to determine an adverse claim to a mining location set up the filing of plaintiff's adverse claim, as provided by Section 1322, after defendant had applied for a patent, and prayed that defendant be required to set forth the nature of his claim to the ground, and that all adverse claims of defendant might be determined by the judgment of the court, and the answer denied plaintiff's ownership and possession, and prayed that defendant be adjudged to be the owner and entitled to possession of the premises sued for, the suit was one of equitable cognizance, and not an action at law.—*Mares v. Dillon*, 117.

Jurisdiction.

3. A court of equity, having obtained jurisdiction of an action for one purpose, may retain that jurisdiction for all purposes necessary to the complete protection of plaintiff's rights.—*McConnell v. Combination M. & M. Co.*, 239.

Adequacy of Remedy at Law.

4. A court of equity will not interfere when the remedy at law is adequate.—*Burton v. Kipp*, 275.

Public Lands—Declaration—Good Faith.

5. Plaintiff in a suit in equity to declare *bona fide* purchasers of a pre-emption to be his trustees, praying that they be decreed to execute and

deliver to him a deed therefor free from all incumbrances, predicated on his contest of the original entry, has no equity which will prevail over the title of defendants, where he never made a declaration of homestead as to the contested pre-emption, nor paid any fees for the land, and his good faith in bringing the suit is questionable.—*Graham v. Great Falls W. P. & T. Co.*, 393.

Jurisdiction—Extent.

6. When a court of equity takes jurisdiction of a controversy between parties, its jurisdiction is full and complete, and it may render a final judgment in relation to all matters involved in and growing out of that controversy.—*Maloney v. King et al.*, 414.

ESCROW.

See DEEDS, 5.

EVIDENCE.

See MINES, 1, 2, 3.

Newly Discovered—New Trial.

1. Code of Civil Procedure, Section 1171, authorizes the granting of a new trial for newly discovered evidence, which the moving party could not with reasonable diligence have discovered and produced at the trial. In an action to recover a loan plaintiff testified in justice's court that no one was present when the loan was made, but in the district court testified that his wife was present. Defendant asked no continuance to secure impeaching witnesses, and made no effort to that end, but himself testified to the contradiction. *Held*, that a new trial was properly refused.—*Smith v. Shook*, 39.

Newly Discovered—Affidavits.

2. The party moving for a new trial on the ground of newly discovered evidence must show by his own affidavit that the new evidence was not known to him at the time of the trial, and the affidavits of other persons on that question are not sufficient.—*Smith v. Shook*, 30.

Conflicting—Finding of Jury Conclusive.

3. Where the evidence was conflicting as to whether there was a contract, the jury's finding is conclusive.—*McMillan v. Frank*, 61.

Injunction—Contempt.

4. In a proceeding to punish for contempt in violating an injunction restraining defendants from working mining properties decreed to be the property of plaintiff, much of the evidence to show that the properties on which defendants worked belonged to plaintiff was speculative, and based on projections made on conclusions from facts observed in workings remote from the points in controversy. *Held* not sufficient to sustain a conviction.—*State ex rel. Boston & Mont. Con. C. & S. M. Co. v. District Court*, 96.

Contract—Conversations.

5. Civil Code, Section 2186, provides that the execution of a contract in writing, whether required to be in writing or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied its execution, and hence evidence of negotiations and conversations immediately preceding the execution of a written contract is incom-

petent to show an agreement concerning its matter made by one claimed to be bound thereby.—*Largey v. Leggat*, 148.

Inspection—Books and Papers—Pending Action.

6. Where, on an application for inspection of books and papers, it appeared that the evidence sought was desired for use in a pending action, and that it was in defendant's possession, and related to the merits of the action stated by plaintiff, it was not a prerequisite to the granting of such application that plaintiff should also show that the evidence could not be obtained from other sources.—*State ex rel. Boston & Mont. Con. C. & S. M. Co. v. District Court*, 206.

Inspection—Time.

7. Under Code of Civil Procedure, Section 1810, declaring that an inspection of evidence shall be had within a specified time, an order granting an inspection is defective, where it fails to fix the time at which the inspection shall begin and when it shall be completed.—*State ex rel. Boston & Mont. Con. C. & S. M. Co. v. District Court*, 206.

Inspection—Letters—Letter Press Copies.

8. Where an order directed defendant to permit plaintiff to inspect original letters in defendant's possession, a further provision that plaintiff should also be entitled to examine "letterpress copies of such letters" was erroneous.—*State ex rel. Boston & Mont. Con. C. & S. M. Co. v. District Court*, 206.

Inspection—Limitation.

9. Where, in an action to have defendant declared a constructive trustee of a certain interest in mining property, plaintiff claimed that he had been deprived of the same by reason of a fraudulent conspiracy by defendant and certain others, by means of which defendant acquired title to the property, an order for inspection of defendant's books and papers with reference to such property should have been limited to such of the correspondence between defendant's executive officers and its agents through whom the purchase of the property was made as related to the acquisition of the title to such property.—*State ex rel. Boston & Mont. Con. C. & S. M. Co. v. District Court*, 206.

Mines—Inspection—Limitation—Access—Issues.

10. An order granting inspection of the underground workings of a mining claim should determine and fix the means of access, and strictly limit the examination to the workings of which it is necessary for plaintiff to have knowledge in order to make surveys and maps to elucidate the issues in controversy.—*State ex rel. Boston & Mont. Con. C. & S. M. Co. v. District Court*, 206.

Mines—Inspection—Cost—Evidence.

11. Under Code of Civil Procedure, Section 1317, requiring plaintiff to pay the cost of an inspection of the underground workings of mining property in controversy, an order granting such an inspection, and arbitrarily fixing the amount to be paid by plaintiff to defendant for lowering and hoisting plaintiff's agents engaged in such inspection at a certain sum, without hearing any evidence as to the actual cost, was erroneous.—*State ex rel. Boston & Mont. Con. C. & S. M. Co. v. District Court*, 206.

Parol—Application of Payment.

12. Under Civil Code, Section 2006, providing that where a debtor makes a payment which is equally applicable to two or more obligations it shall be applied according to the intention expressed by the debtor, or, if no such application is made, then the creditor may apply it to the extinction of any obligation, where several written instruments relating to the same indebtedness contained no provision for the order of payment, parol evidence was competent to show what application of a payment was agreed on.—*Grogan v. Valley Trading Co.*, 229.

Conflict—Affirmance.

13. Where the instructions fairly presented to the jury the questions involved, and the evidence is conflicting and is amply sufficient to sustain the verdict, and no reversible error is apparent, the case will, on appeal, be affirmed.—*Rouce v. Shannon*, 238.

Corporations—Action Against Officers—Sufficiency.

14. In an action by minority stockholders against the officers and directors of a corporation for fraudulently diverting and misappropriating its funds, evidence examined, and held sufficient to charge the president and secretary with knowledge of all expenditures made, to whom they were made, and for what purpose.—*McConnell et al. v. Combination M. & M. Co.*, 239.

Stockholders' Meetings—Minutes—Admissibility.

15. Minutes of a stockholders' meeting, consisting of separate sheets of paper pinned to the leaves of a record book, are insufficiently identified to make them admissible.—*McConnell et al. v. Combination M. & M. Co.*, 239.

Corporations—By-Laws—Admissibility.

16. Under Code of Civil Procedure, Section 3130, providing that, when part of a writing is given in evidence by one party, the whole on the same subject may be inquired into by the other, the act of plaintiffs, in an action against the officers and directors of a corporation for fraudulently diverting and misappropriating the corporate funds, in first introducing some insufficiently identified by-laws, though denying the legality of their adoption, renders the others admissible on behalf of the defendants.—*McConnell et al. v. Combination M. & M. Co.*, 239.

Written Assignment—Original—Copy.

17. In an action on an assigned demand there was admitted in evidence on behalf of plaintiff a so-called "duplicate" written assignment, but on appeal by defendant it did not appear from the record whether the original or duplicate assignment was delivered to plaintiff by the assignor, or whether the paper admitted in evidence was merely a copy of the original. Held, that it was not shown that error was committed, even if the original or duplicate should have been produced instead of a copy.—*Hennessy v. Kennedy Furniture Co.*, 264.

Parol—Explanation.

18. Plaintiff claimed that she deposited with defendant money to be applied on the price of furniture, on an understanding that, if the sale should not be consummated, the money should be returned, and defendant claimed there was a sale and part payment. Held, that it was proper to admit testimony on behalf of plaintiff to explain the purpose and meaning of a receipt given by defendant to plaintiff.—*Hennessy v. Kennedy Furniture Co.*, 264.

New Trial—Surprise—Newly Discovered Evidence.

19. The granting or refusing of a new trial upon the ground of surprise or newly discovered evidence rests largely in the discretion of the trial court, and its ruling will not be disturbed in the absence of an abuse of such discretion.—*Landeau v. Frazier*, 267.

Conflict—Findings.

20. Where there is evidence to sustain the findings of the trial court, and the evidence is conflicting, the findings and decision will not be disturbed on appeal.—*Landeau v. Frazier*, 267.

Municipal Corporation—Bonds—Reports of Treasurer—Sureties.

21. Reports of a city treasurer to the city council of moneys received and disbursed during the month, which he is required to make by Political Code, Section 4788, may be given in evidence against the sureties on his official bond, and are *prima facie* true, and, when not contradicted by the sureties, are binding on them.—*City of Philipsburg v. Degenhart*, 299.

Appeal—Conflict—Sufficiency.

22. The evidence being conflicting, its sufficiency to sustain the verdict or judgment will not be considered on appeal.—*Butte Mining & Milling Co. v. Kenyon*, 314.

Conflict—Insufficiency—Appeal.

23. Where there is a substantial conflict in the evidence, the supreme court, on appeal, will not reverse the judgment of the lower court on the ground of alleged insufficiency of the evidence.—*Butte Mining & Milling Co. v. Kenyon*, 314.

Cross-Examination—Appeal.

24. Error in refusing to permit cross-examination of plaintiffs' witness as to the extent of his admitted interest in the suit is not ground for reversal, where other evidence shows that, for purposes of collection, the witness had assigned to plaintiffs his account against defendants, which constituted one of the causes of action.—*Hefferlin et al. v. Karlman et al.*, 348.

Cross-Examination—Restriction.

25. Cross-examination should not be unduly restricted.—*Hefferlin et al. v. Karlman et al.*, 348.

Mortgages—Admissibility—Building and Loan Associations.

26. In an action to foreclose a building and loan association mortgage the member's certificate of stock, and the by-laws and statements printed thereon, constituting the contract between the association and such member, were properly admitted in evidence.—*Floyd-Jones v. Anderson et al.*, 351.

Building and Loan Associations—By-Laws—Mortgages.

27. In an action to foreclose a building and loan association mortgage it was immaterial, on the question of the admissibility of matter which purported to be the by-laws of the association, whether it in fact constituted such by-laws or not, where it constituted a part of the written contract existing between the shareholder and the association, and was given to him by the association as the by-laws.—*Floyd-Jones v. Anderson et al.*, 351.

Insolvency—Question of Fact.

28. Insolvency is a question of fact to be proved by evidence, and is not presumed.—*Floyd-Jones v. Anderson et al.*, 351.

Insufficiency—Findings—Specification of Errors.

29. Under Code of Civil Procedure, Section 1173, a specification in the statement that the court erred in making a certain finding, "there being insufficient evidence to justify said finding, and the evidence being insufficient to support the same, and said finding is contrary to the evidence, and wholly unsupported thereby," is not a proper specification of the insufficiency of the evidence.—*Schilling v. Curran*, 370.

Offer of Proof—Good Faith.

30. An offer to prove is not sufficient, without having the witness present and calling him, or asking leave to call him, or without affirmatively showing that the offer is made in good faith, and with the means of doing or trying to do what is desired.—*Schilling v. Curran*, 370.

Reopening Case—Further Testimony.

31. Where counsel for defendant had, in his case in chief, introduced evidence bearing on the connection of plaintiff with the fraudulent acts of a debtor, it was his duty to have completed his showing in that regard before he closed his case, and it was proper to refuse to allow him to reopen it for the purpose of introducing further evidence on that subject.—*Schilling v. Curran*, 370.

Witness on Former Trial—Admissibility.

32. The testimony of a witness on a former trial is inadmissible in the absence of a showing that it was given in an action between the same parties relating to the same manner.—*Leggat v. Carrol*, 384.

Referees—Erroneous Admission—Appeal.

33. Admission of immaterial evidence in an action tried by a referee is not ground for reversal, there being sufficient competent evidence to sustain the judgment.—*Way v. Sherman*, 410.

Conflict—Findings—Appeal.

34. The judgment, so far as it depends on findings of fact, will not be disturbed on conflicting evidence.—*Way v. Sherman*, 410.

Proof of Lost Instrument—Sufficiency.

35. Under the provisions of the Code of Civil Procedure, in order to establish the former existence of an instrument in writing, under which plaintiff claims, he is compelled to prove its execution and contents, including all the substantial parts of the lost instrument, to such an extent as to constitute a practical reproduction of the instrument in all of its substantial parts.—*Capell et al. v. Fagan*, 507.

Lost Instrument—Proof—Competency.

36. Proof of negotiations, conversations and acts of parties before, at the time of and after the execution of a written instrument, are not competent to prove its contents where the instrument is lost.—*Capell et al. v. Fagan*, 507.

Lost Instrument—Parol Testimony.

37. Where a written contract is to be proved by parol testimony, no vague, uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself, but the substance of the agreement must be proved satisfactorily.—*Capell et al. v. Fagan*, 507.

Contracts—Consideration.

38. While, under the statutes, the consideration need not be mentioned in a deed, yet, if it is mentioned and set forth in the deed, it becomes a substantial part of the contents thereof, and must be proven like any other of the contents on loss thereof.—*Capell et al. v. Fagan*, 507.

Lost Instrument—Proof—Insufficiency.

39. In an action to recover a portion of a mining claim, in which plaintiffs claimed under a deed which had been destroyed, evidence considered, and held not to show the contents of the deed by such direct and positive evidence as to enable the court to say that there was a conveyance.—*Capell et al. v. Fagan*, 507.

Robbery—Details—Conspiracy.

40. Where defendant, while engaged in attempting to rob the safe on a train, robbed a mail clerk, on a prosecution for the robbery of the mail clerk it was proper to admit evidence as to all the details of the attempted robbery of the train, and a conspiracy therefor.—*State v. Howard*, 518.

Criminal Law—Letters—Handwriting—Identification.

41. Where, on a criminal prosecution, the state offered in evidence a letter claimed to have been written by accused, and a witness testified that he was familiar with defendant's handwriting, and that the letter looked like his writing, and that the signature was his signature, there was a sufficient identification of the letter as one written by defendant.—*State v. Howard*, 518.

Criminal Law—Insanity—Letters—Harmless Error.

42. Where a letter improperly admitted was immaterial, and the only defense made in the case was insanity, the admission of the letter was harmless error.—*State v. Howard*, 518.

Criminal Law—Prejudicial Error.

43. In a criminal case, error in the admission of evidence, to secure a reversal of a judgment of conviction, must be prejudicial to the defendant.—*State v. Howard*, 518.

Criminal Law—Commitment—Identification.

44. Where the warden of the penitentiary testified that defendant had been confined in the penitentiary, and there was admitted in evidence a commitment against him, and it appeared that the date of his commitment and release corresponded with the requirements of the commitment, and other witnesses testified that they knew defendant when he was in the penitentiary, an objection that defendant was not identified as the man to whom the commitment referred was of no merit.—*State v. Howard*, 518.

Criminal Law—Prior Conviction—Manner of Proving.

45. The proper manner of proving a prior conviction is not by the introduction of the commitment, but by the record of the judgment. (Code of Civil Procedure, Sec. 3193.)—*State v. Howard*, 518.

Robbery—Insanity—Cross-Examination.

46. Where, on a prosecution for robbery, a witness on direct examination testified that he had been confined in the penitentiary, and that he had known the defendant for about fifteen months, and had observed his demeanor at the penitentiary, and that he thought defendant insane, questions put to him on cross-examination for the purpose of showing that he was a member of the conspiracy which resulted in the robbery were not improper, as exceeding the proper limits of cross-examination.—*State v. Howard*, 518.

Criminal Law—Cross-Examination—Question Tending to Degrade Witness.

47. Where a witness for defendant had testified that he had been in the penitentiary, and that he was then in jail, a question put to him on cross-examination as to whether he was not in jail on a charge of holding up a saloon was not erroneous, as tending to degrade the witness. The question was not prejudicial, as not proper cross-examination.—*State v. Howard*, 518.

Robbery—Ownership of Money Taken.

48. On a prosecution for robbery, the fact that the money taken was in prosecutor's possession is sufficient evidence of ownership to sustain a conviction.—*State v. Howard*, 518.

Corporations—Manner of Proving Organization.

49. The organization of a corporation under the state law was properly proved by a copy of its certificate of incorporation, certified by the secretary of state, under Code of Civil Procedure, Section 8207.—*Western Iron Works v. Montana Pulp & Paper Co.*, 550.

Mechanic's Liens—Foreclosure.

50. In a proceeding to foreclose a mechanic's lien, evidence reviewed, and held to sustain a finding that the materials and labor were furnished under a single contract on an open, continuous account.—*Western Iron Works v. Montana Pulp & Paper Co.*, 550.

EXECUTIONS.

Defective Writ—Seal of Court—Curative Act.

1. A sale made under an execution defective by reason of its failure to contain the seal of the court is validated by Act of March 2, 1899 (Session Laws of 1899, p. 145), providing that all judicial sales of real property previously made to satisfy valid judgments shall be sufficient to sustain a sheriff's deed based on the sale, and all defects in the issuance of execution shall be disregarded.—*Burton v. Kipp*, 275.

Judgment Roll—Issuance of Writ.

2. Under Code of Civil Procedure, Section 1210, providing that a party may at any time within six months after the entry of judgment have an

execution issued for its enforcement, the making up of the judgment roll, as required by Section 1196, is not a prerequisite to the issuance of execution.—*Burton v. Kipp*, 275.

Sale—Inadequacy of Price—Validity.

3. Under Code of Civil Procedure, Section 1227, providing that all sales under execution shall be at auction, to the highest bidder, mere inadequacy of the price, not attended by fraud, mistake or surprise tending to influence the result, does not invalidate such a sale.—*Burton v. Kipp*, 275.

Sale—Notice—Validity—Remedy.

4. Under Code of Civil Procedure, Section 1225, prescribing the notice to be given of sales under execution, and Section 1226, providing that an officer selling without the notice prescribed forfeits \$500 to the aggrieved party, in addition to his actual damages, failure to give the notice does not invalidate the sale, the remedy provided being exclusive.—*Burton v. Kipp*, 275.

Sale—Parcels—Presumption of Regularity.

5. Code of Civil Procedure, Section 1227, provides that, when real property sold under execution consist of several "known lots or parcels," they must be sold separately. Section 3266 states the legal presumption that official duty has been performed. *Held*, that it must be presumed that an officer complied with the statute in the sale of a city lot, though it was composed of two parcels and was sold in gross, since the parcels may not have been known, or may have been offered separately and sold in gross only after it was found that there were no bidders for the parcels.—*Burton v. Kipp*, 275.

FAIR TRIAL.

See DISTRICT JUDGES, 1-14.

See CONSTITUTION, 11-21.

See LEGISLATURE.

See CHANGE OF VENUE.

See CONTEMPT, 5, 9.

FINDINGS.

Not Within Issue—Decree.

1. Findings not within the issue made by the pleadings will not support a decree.—*Largey v. Leggat*, 148.

Judgments—Appeal—Exceptions.

2. Under the express provisions of Code of Civil Procedure, Section 1114, no judgment can be reversed on appeal for want of a finding at the instance of a party who has not requested the findings, nor in cases of defects in the findings, unless exceptions have been made in the trial court as provided in Section 1115.—*Grogan v. Valley Trading Co.*, 229.

Deed—Harmless Error.

3. The error in a finding that a deed was executed December 16, 1893, where, under the facts admitted, it was executed "on or about April 19, 1893." was harmless.—*Grogan v. Valley Trading Co.*, 229.

Conflict in Evidence—Appeal.

4. Findings of the trial court, based on conflicting evidence, will not be disturbed on appeal.—*Hennessey v. Kennedy Furniture Co.*, 264.

Conflict in Evidence—Appeal.

5. Where there is evidence to sustain the findings of the trial court, and the evidence is conflicting, the findings and decision will not be disturbed on appeal.—*Landeau v. Frazier*, 267.

Time for Making Request.

6. Under Code of Civil Procedure, Section 1114, requests for findings made after the filing of the findings and conclusions of law are presented too late, and the want of such findings cannot be made a ground for reversal.—*Schilling v. Curran*, 370.

Bankruptcy.

7. In proceedings by a trustee in bankruptcy to recover property sold by the bankrupt within four months prior to the filing of the petition, a finding of fact as to whether the property was sold within four months preceding the date of the adjudication in bankruptcy was unnecessary, where it was undisputed on the trial that the sale was made on June 2d, and that the adjudication was made on July 18th of the same year.—*Schilling v. Curran*, 370.

Objections—Appeal—Presumptions.

8. Where a finding on the value of property in dispute was made, and not objected to, and the sufficiency of the evidence is not brought before the supreme court for consideration, that court will presume that the finding was sustained by the evidence, and will not consider a contention that the judgment is excessive.—*Schilling v. Curran*, 370.

Implied—Appeal—Request.

9. Where the record on appeal does not disclose that any findings were requested by either party, or that any were made, all findings necessary to support the judgment are implied.—*Slater Brick Co. v. Shackleton et al.*, 390.

Appeal—Conflict in Evidence.

10. Where the evidence is conflicting, the supreme court on appeal will not disturb the findings of the trial court.—*Slater Brick Co. v. Shackleton et al.*, 390.

GUARDIAN AND WARD.

Attorney—Right to Appear for Guardian.

1. That a party becomes insane while indebted to an attorney who was representing him at the time with respect to his property interests does not give such attorney the right *per se* to appear as attorney for the party's guardian, who by reason of such appointment, as provided by Civil Code, Section 3151, becomes responsible for the estate and the proper conduct of the incompetent's affairs.—*State ex rel. Davis v. District Court*, 8.

Insanity—Appointment of Guardian—Lien.

2. Where at the time of the insanity of a client he was indebted to his attorney who had charge of his interests, the appointment of a guardian for the client did not divest the attorney of any lien or security which he had at the time to secure payment of his fees.—*State ex rel. Davis v. District Court*, 8.

Allowance of Claims—Attorney's Fees.

3. Under Code of Civil Procedure, Section 2810 *et seq.*, providing for the allowance and payment of claims against the estate of an incompetent by his guardian, a guardian appointed for an incompetent who was indebted to his attorney for fees at the time of such appointment could not pay such attorney the fees claimed to be due out of the funds of the incompetent's estate until such claims had been allowed by the court.—*State ex rel. Davis v. District Court*, 8.

Substitution of Attorneys—Fees.

4. Under Code of Civil Procedure, Section 399, providing that an attorney in an action may be changed on the order of the court on an application of either client or attorney, after notice from one to the other, an incompetent's guardian was absolutely entitled to have a different attorney substituted to represent him, for the firm which had represented the incompetent prior to the guardian's appointment, notwithstanding the fees due such substituted attorneys have not been paid.—*State ex rel. Davis v. District Court*, 8.

INFORMATION.

See CRIMINAL LAW, 2, 5, 6.

INJUNCTIONS.

Action on Bond—Pleadings.

1. The complaint on an injunction bond, conditioned for payment of damages suffered by reason of the injunction, if it be decided there was no right thereto, must allege a failure to pay.—*Van Horn v. Holt*, 69.

Contempt—Evidence.

2. In a proceeding to punish for contempt in violating an injunction restraining defendants from working mining properties decreed to be the property of plaintiff, much of the evidence to show that the properties on which defendants worked belonged to plaintiff was speculative, and based on projections made on conclusions from facts observed in workings remote from the points in controversy. *Held* not sufficient to sustain a conviction. *State ex rel. Boston & Mont. Con. C. & S. M. Co. v. District Court*, 96.

Trespass—Mining Claim—Contempt—Evidence.

3. Plaintiff in an action for an injunction to restrain trespass on a mining claim alleged that another cause of action, which was stricken from the complaint, was for damages for trespasses on veins lying south of the vein with reference to which injunction was sought, and the court found all the issues for plaintiff. On a subsequent proceeding to punish defendants for violation of the injunction the evidence showed that the veins with reference to which the injunction was alleged to have been disobeyed were the only ones south of the vein involved in the injunction suit. *Held*, that the title

to these veins was not determined by the injunction suit.—*State ex rel. Boston & Mont. Con. C. & S. M. Co. v. District Court*, 96.

Contempt—Nature of Proceedings.

4. *Obiter*: A proceeding in contempt to punish for the violation of an injunction, is distinct from the action wherein the injunction violated was issued.—*State ex rel. Boston & Mont. Con. C. & S. M. Co. v. Judges*, 193.

Suit to Quiet Title to Ore Veins—Multiplicity of Suits.

5. Where, in a suit to quiet title to a vein of ore and for damages for a trespass on the vein, defendants did not seek an injunction restraining plaintiffs from operating the vein, they were not entitled to such an injunction in a subsequent suit by them, proceeding for such relief having been open to them in the former suit.—*Maloney v. King et al.*, 414.

Multiplicity of Actions.

6. Where, in a suit for an injunction restraining the operation of an ore vein, the injunction was denied, complainants might not, after dismissing the suit, institute another on the same ground, and again apply for an injunction for the same purpose.—*Maloney v. King et al.*, 414.

Trespass on Ore Veins.

7. Plaintiffs sued for damages because of the trespass on an ore vein, for an injunction restraining defendants from operating the vein, and for the quieting of plaintiffs' title to the vein, the issue being whether the apex of the vein was within the boundaries of plaintiffs' or within the boundaries of defendants' location. An injunction was granted, and subsequently defendants commenced various suits against plaintiffs, for trespass, etc., on the vein, the question in all the actions being the location of the apex of the vein. *Held*, that plaintiffs were properly awarded in their original suit an injunction restraining defendants from bringing any action or interfering with the removal of ores from the vein until the final determination of plaintiffs' suit.—*Maloney v. King et al.*, 414.

Pendente Lite—Discretion of Trial Court.

8. The granting of an injunction *pendente lite* is within the discretion of the trial court, and, in the absence of a clear abuse of it, the supreme court will not interfere.—*Heinze et al. v. Boston & Mont. Con. C. & S. M. Co.*, 484.

INSANITY.

See CRIMINAL LAW, 8, 11, 16.

Proof—By Reputation.

1. Insanity cannot be proved by reputation.—*State v. Lagoni et al.*, 472.

Robbery—Criminal Intent.

2. On a prosecution for robbery, the question whether defendant was, by reason of insanity, incapable of having the criminal intent necessary to the commission of the crime, was raised by a plea of not guilty.—*State v. Howard*, 518.

Robbery—Intent—Question of Fact.

3. On a prosecution for robbery, the question whether defendant was, by reason of insanity, incapable of having the criminal intent necessary to the commission of the crime, was a question of fact for the jury.—*State v. Howard*, 518.

Criminal Law—Doubt as to Sanity.

4. Penal Code, Section 2521, provides that when an action is called for trial, or at any time during a trial, or when the defendant is brought up for judgment, if a doubt arises as to the sanity of defendant, the court must order the question as to his sanity to be submitted to a jury. *Held*, that the doubt mentioned in the statute is one arising in the mind of the judge, and one which he must determine.—*State v. Howard*, 518.

INSTRUCTIONS.

Suit to Indemnify Lessees—Harmless Error.

1. In an action against the lessor of a mining claim on an alleged agreement to indemnify the lessees for expenses incurred in case an adjoining owner's suit should be compromised, or the mining claim sold, any error in an instruction that the order of dismissal in the adjoining owner's suit was not final was harmless, where it was undisputed that the lessor sold the claim.—*McMillan v. Frank*, 61.

Suit in Equity—Adverse Claim—Estoppel.

2. Where, in a suit to determine an adverse claim to a mining location, defendant was estopped to deny that the suit was equitable in its character, he could not object to instructions to the jury.—*Mares v. Dillon*, 117.

Action for Damages—Removal of Ore—Mines.

3. In an action for damages sustained by plaintiffs, owing to defendants having removed ore from within the boundaries of plaintiffs' location, an instruction that if defendants had carried away ores belonging to plaintiffs, and in so doing they were mixed with other ores to which defendants were entitled, so that the amount of each could not be ascertained, plaintiffs were entitled to recover the value of all ores taken with which the ores belonging to plaintiffs were mixed, was erroneous.—*Maloney v. King et al.*, 158.

Action for Diversion of Water—Contradictory.

4. In an action for the unlawful diversion of water, certain instructions reviewed and *held* erroneous, as inconsistent and contradictory.—*Flannery v. Campbell*, 172.

Appeal—Judgment Roll.

5. The instructions, which are a part of the judgment roll, not appearing therein, as it is certified, but being merely in the statement on motion for a new trial, cannot be considered.—*Butte Mining & Milling Co. v. Kenyon*, 314.

Appeal—Record—Statutes—Judgment Roll.

6. Though the preparation of the record to present to the supreme court is not a jurisdictional matter, nevertheless a substantial compliance with

the statute in this respect is necessary to present alleged errors for review, hence where instructions on appeal do not appear in the judgment roll, but merely in the statement on motion for a new trial, they cannot be considered.—*Butte Mining & Milling Co. v. Kenyon*, 314.

Appeal—Judgment Roll.

7. Instructions not being made part of the judgment roll are not open to review.—*Shropshire v. Sidebottom*, 406.

JUDGMENTS.

What May Constitute Judgment Roll.

1. Though there is no formal judgment roll consisting of the papers enumerated in Code of Civil Procedure, Section 1196, because there was no formal answer, yet the only papers which could be incorporated in the roll—the complaint, stipulation with exhibit attached (which the court and parties treated as amending the complaint and presenting an issue), the judgment and bill of exceptions—being in the record, properly certified as constituting the judgment roll, will be considered as such.—*Bickford v. Kirwin*, 1.

Pleadings—Issue Framed.

2. Judgment on the pleadings cannot be entered where there is an issue framed thereby.—*Moore v. Murray*, 13.

Entry of Final Judgment—Judgment on Pleadings.

3. Although Code of Civil Procedure, Section 741, provides that an appeal cannot be taken from a denial of judgment on the pleadings, and that subsequent proceedings of either party are not prejudiced thereby, it was proper for the court to enter judgment for defendant after overruling plaintiff's motion for judgment on the pleadings, where plaintiff, instead of proceeding to trial upon the merits, announced that he would stand on the motion as made.—*Moore v. Murray*, 13.

Claim and Delivery.

4. The judgment in a claim and delivery action must be in the alternative.—*Hynes v. Barnes*, 25.

Verdict to Support Judgment.

5. The verdict must support the judgment, and both verdict and judgment must conform to the law.—*Hynes v. Barnes*, 25.

Correction of Judgment After Appeal.

6. The trial court has no authority,—after an appeal from a judgment in a claim and delivery action has been perfected, to correct the judgment by entering a judgment in the alternative.—*Hynes v. Barnes*, 25.

Appeal.

7. A party in whose favor a judgment is rendered cannot, by failing to see that a proper judgment is entered, deprive his adversary of the right of appeal.—*Hynes v. Barnes*, 25.

Dismissal—Appeal.

8. Code of Civil Procedure, Section 1722, as amended by Session Laws 1899, p. 146, authorizes an appeal from a final judgment or from any special order made after final judgment. Section 1004 authorizes the dismissal of an action in certain cases, and declares that such dismissal is made by entry in the clerk's register. *Held*, that an entry noting the filing of an agreement to dismiss, is not a dismissal from which an appeal can be taken.—*Kinman v. Scheuer*, 73.

Appeal—Special Order After Judgment.

9. Under Code of Civil Procedure, Section 1722, authorizing an appeal from any special order made after final judgment, an order overruling a motion to set aside a pretended judgment of dismissal, which was in fact not a dismissal within Section 1004, authorizing dismissal, is not appealable.—*Kinman v. Scheuer*, 73.

Appeal—Final Judgments—Dismissal.

10. Under Code of Civil Procedure, Section 1722, authorizing appeals from final judgments and special orders made after final judgments, an appeal from an order denying a motion to adopt a general verdict and special findings and to set aside the special verdict in a suit in equity must be dismissed where the record shows no judgment of dismissal or other final judgment.—*Kinman v. Scheuer*, 73.

Water Rights—Conclusiveness.

11. Where an action was brought to determine the right of plaintiff's landlord to an interest in an irrigating ditch, to establish his right to use the ditch, and to enjoin defendant from interfering with plaintiff's use thereof, in which defendant denied the landlord's right to the ditch, but it was subsequently determined that he was a tenant in common thereof, and an order previously issued, restraining defendants from deflecting the flow, was modified so as to allow fifty inches of water to flow to the landlord's premises, such judgment was not conclusive, in a subsequent action by the tenant for damages to crops by reason of defendant's alleged previous diversion, that defendant had deprived plaintiff of all the water which should have been permitted to flow on her land.—*Flannery v. Campbell*, 172.

Failure to Enter Judgment—Effect.

12. Where a suit is dismissed pursuant to a compromise agreement, and defendants neglect to have a judgment for costs entered in their favor, there is no judgment from which they can appeal.—*Musigbrod v. Hartford*, 273.

Judgment Roll—Execution.

13. Under Code of Civil Procedure, Section 1210, providing that a party may at any time within six months after the entry of judgment have an execution issued for its enforcement, the making up of the judgment roll, as required by Section 1196, is not a prerequisite to the issuance of execution.—*Burton v. Kipp*, 275.

Creditors—Agreement.

14. An agreement whereby judgment creditor agreed that the judgment should not be enforced until a claim of a third party against them was settled was too indefinite as to time to be enforceable.—*Burton v. Kipp*, 275.

Creditors—Agreement—Consideration—Third Party.

15. An agreement not to enforce a judgment till a claim of a third party against the judgment creditor should be settled was based on no consideration.—*Burton v. Kipp*, 275.

Default—Justices' Courts.

16. Where defendant in a justice's court filed an answer which put in issue the allegations of the complaint, the justice could not enter judgment by default on failure of defendant to appear at the time set for trial.—*Clark v. Great Northern Ry. Co.*, 458.

Default—Justices' Courts.

17. Where the record of an action before a justice showed that he tried the issues, and entered judgment on the proof adduced by plaintiff, the judgment was not one by default, although the justice's docket recited the notice and entry of defendant's default.—*Clark v. Great Northern Ry. Co.*, 458.

JURISDICTION.

See, also, Costs, 5.

Stipulation—Agreed Case.

1. Where a complaint is filed giving jurisdiction, and a stipulation is then filed, treated by the court and parties as amending the complaint and raising an issue, the case is not an agreed case, which has to be submitted with the formalities required by Code of Civil Procedure, Section 2050 *et seq.*, to give jurisdiction.—*Bickford v. Kirwin*, 1.

Equity.

2. A court of equity, having obtained jurisdiction of an action for one purpose, may retain that jurisdiction for all purposes necessary to the complete protection of the plaintiff's rights.—*McConnell et al. v. Combination M. & M. Co.*, 239.

Appeals—Statutes.

3. The statutory steps necessary to perfect an appeal are jurisdictional, and unless they are taken as provided by the statute, the supreme court has no power to consider the case.—*Butte Mining & Milling Co. v. Kenyon*, 314.

Equity—Full and Complete.

4. When a court of equity takes jurisdiction of a controversy between parties, its jurisdiction is full and complete, and it may render a final judgment in relation to all matters involved in and growing out of that controversy.—*Maloney et al. v. King et al.*, 414.

District Courts—Appellate Jurisdiction Limited.

5. The district court, sitting as an appellate court, is one of limited jurisdiction, and may only proceed in the manner and to the extent provided by law.—*Clark v. Great Northern Ry. Co.*, 458.

JURY.**View of Property in Litigation—Court's Discretion.**

1. Code of Civil Procedure, Section 1081, provides that when, in the opinion of the court, it is proper for the jurors to have a view of the property

which is the subject of litigation, it may order them to be conducted there. *Held*, that the view is within the trial court's discretion.—*Maloney et al. v. King et al.*, 158.

View of Premises—Discretion—Appeal.

2. Discretion of court in granting a view of premises will not be reviewed on appeal, in the absence of a clear showing of error.—*Maloney et al. v. King et al.*, 158.

Withdrawal of Case from Jury.

3. No case should be withdrawn from the jury unless the conclusion necessarily follows from the facts as a matter of law that no recovery could be had on any view which could reasonably be drawn from the facts which the evidence tends to establish.—*McCabe v. Montana Central Ry. Co.*, 323.

Criminal Law—Voir Dire Examination—Defense of Insanity.

4. Where jurors state on their *voir dire* examination that they were prejudiced against the defense of insanity, but upon further examination say that they would treat it like any other defense; would follow the court's instructions thereon, and, if the instructions should in any manner differ from their own ideas, they would follow the instructions, they have qualified themselves as competent jurors.—*State v. Howard*, 518.

Criminal Law—Voir Dire—Reading Newspapers.

5. Where a venireman in a criminal case stated on his *voir dire* that he had read the newspaper accounts of the alleged robbery, and had formed an opinion, but not a fixed one, and on re-examination he said he could entirely discard the opinion thus formed, and give the defendant as fair a trial as if he had never heard of the case, he was competent.—*State v. Howard*, 518.

JUSTICES OF THE PEACE.

Appeal—Service of Notice—Presumptions.

1. Code of Civil Procedure, Section 1760, provides that an appeal from a justice is to be taken by filing a notice of appeal with the justice, and serving a copy on the adverse party. *Held* that, in the absence of any showing to the contrary, it is to be presumed that a notice filed with the justice was properly served.—*Morin v. Wells et al.*, 76.

Appeal—Bond—Justification of Sureties—Jurisdiction.

2. Code of Civil Procedure, Section 1763, provides that an appeal from a justice's court to the district court is not effectual for any purpose unless an undertaking be filed, and that appellee may except to the sufficiency of the sureties on the undertaking, and unless they or other sureties justify within five days, the appeal must be regarded as if no undertaking had been given. *Held*, that an exception to the sureties does not divest the jurisdiction of the district court of the appeal; that the requirement of the statute concerning the justification of the sureties is directory, for appellee's benefit, and that he may waive his privilege of excepting to the sureties, or may except to the sureties and afterwards withdraw such exception; that the statute is mandatory only where the appellee insists that the sureties justify within five days.—*Morin v. Wells et al.*, 76.

Appeal—Jurisdiction.

3. Unless an appeal from a justice's court is taken within the time, and effectuated in accordance with the regulations, prescribed in the Code of

Civil Procedure, the district court has no jurisdiction of the appeal, except to dismiss it.—*State ex rel. Cobban v. District Court*, 93.

Appeal—Judgment.

4. The only appeal from a justice's court provided for by the Code of Civil Procedure, is an appeal from a judgment, hence there is no appeal to the district court from an order made in a justice's court either before or after judgment.—*State ex rel. Cobban v. District Court*, 93.

Judgment by Default.

5. Where defendant in a justice's court filed an answer which put in issue the allegations of the complaint, the justice could not enter judgment by default on failure of defendant to appear at the time set for trial.—*Clark v. Great Northern Ry. Co.*, 458.

Judgment by Default—Dockets.

6. Where the record of an action before a justice showed that he tried the issues, and entered judgment on the proof adduced by plaintiff, the judgment was not one by default, although the justice's docket recited the notice and entry of defendant's default.—*Clark v. Great Northern Ry. Co.*, 458.

Appeal—Trial in District Court.

7. Constitution, Article VIII, Section 23, provides for appeals from justices' courts to the district courts under regulations prescribed by law. Section 11 provides that the district court shall have appellate jurisdiction in such cases arising in justices' courts as may be prescribed by law. Code of Civil Procedure, Section 1760, provides the manner of taking an appeal from the justice's court, and Section 1761 provides that on such an appeal the cause must be tried anew in the district court. *Held*, that only such questions as were raised and presented in the justice's court can be tried on appeal in the district court, and where there was no showing that a motion was made in the justice's court to set aside the judgment and dismiss the cause, but the record showed that the case was tried on issues of fact raised by the answer, it was proper for the district court, on appeal from a judgment for plaintiff, to overrule a motion to dismiss the cause, and to try the issues of fact which had been raised before the justice.—*Clark v. Great Northern Ry. Co.*, 458.

Jurisdiction—Presumptions.

8. A justice's court is of inferior jurisdiction, and no presumptions are to be indulged in favor of the regularity of the proceedings.—*State v. Laogni et al.*, 472.

Criminal Jurisdiction—Action on Bail Bonds—Pleadings.

9. Constitution, Article VIII, Section 20, gives a justice court jurisdiction as an examining court in cases of felony, and Code of Civil Procedure, Section 745, declares that in pleading a judgment or other determination of a court, officer or board, it is not necessary to state the facts conferring jurisdiction, but the determination or judgment may be stated to have been "duly given or made." In an action on a bail bond the complaint alleged that a certain person was ordered by a certain justice of the peace to be held to answer on a charge of burglary, on which he was admitted to bail; the justice then and there having full authority and power to accept and approve the bond; and that he duly approved it, and ordered the release of defendant. *Held*, that the complaint was insufficient for failing to allege

the jurisdictional facts that the defendant was charged by a complaint filed with the justice, and examined upon the charge, etc., or to state the judicial capacity of the justice, and that the order holding defendant to answer was "duly given" or "duly made" or "duly given and made."—*State v. Lagoni et al.*, 472.

Bail—Jurisdiction.

10. Though a committing magistrate has made his return to the clerk of the district court, he still has power and authority to accept and approve the bail undertaking required by his order until the district court obtains final jurisdiction on the filing of an information, or the presentation of an indictment, or until a district judge or justice of the supreme court has fixed anew defendant's bail.—*State v. Lagoni et al.*, 472.

LEASES.

Liability for Rent "During Occupancy."

1. Under the first paragraph of the *habendum* clause, the property was leased to defendant for the full term of two years, unless the lease was sooner forfeited. It then provided that the lessee should pay the lessor, as rent for the premises, \$150 per month "during occupancy" thereof, and that, should the lessee fail to make such payments, the lessor might re-enter without this working a forfeiture of the rents to be paid, and that the lessee should not sublet, and should surrender the property "at the expiration of the time herein recited." *Held*, that "during occupancy" meant "while possession continues," that is, during the whole term; so that the lessee could not, before expiration of the term, surrender possession and relieve himself from liability for further rent.—*Bickford v. Kirwin*, 1.

Mining Claim—Indemnity—Evidence.

2. In an action by the lessees of a mining claim on an alleged agreement to pay them \$8,000 to indemnify them for expenses incurred in case the lessor should compromise an adjoining owner's suit for possession of a mine, or should sell the mining claim, the lessor's testimony that he sold the claim, together with other mining property, for \$2,500, was admissible.—*McMillan v. Frank*, 61.

Mining Claim—Suit for Possession—Evidence.

3. Where the lessees of a mining claim showed that a suit against the lessor for possession of a mine in the claim was ordered dismissed as settled, the lessor's testimony that he knew nothing about a compromise of the suit, and did not know it was dismissed as settled, was admissible.—*McMillan v. Frank*, 61.

Indemnity—Adjoining Owner's Suit—Evidence.

4. In an action against the lessor of a mining claim on an alleged agreement to indemnify the lessees for expense in working a mine thereon in case an adjoining owner's suit for possession of the mine should be compromised, or the claim sold, where the witnesses for the lessees, in the examination in chief, purported to give the entire conversation on which their claim of a contract was based, testimony in rebuttal as to whether the promises to indemnify the lessees were made dependent on finding that the apex of the mine in the lessor's claim was properly excluded.—*McMillan v. Frank*, 61.

Mining Claim—Apex—Consideration.

5. Where a mine worked by lessees of a claim had its apex in an adjoining claim, the lessor was under no obligation to protect them against a suit of the adjoining owner for possession of the mine, and his promise to do so is not binding, unless supported by some other consideration than the covenants of the lease.—*McMillan v. Frank*, 61.

Instructions—Harmless Error.

6. In an action against the lessor of a mining claim on an alleged agreement to indemnify the lessees for expenses incurred in case an adjoining owner's suit should be compromised, or the mining claim sold, any error in an instruction that the order of dismissal in the adjoining owner's suit was not final was harmless, where it was undisputed that the lessor sold the claim.—*McMillan v. Frank*, 61.

LEGISLATURE.

See, also, CONSTITUTION.

Regular Sessions—Plenary Powers.

1. When convened in regular session, the power of the legislature to enact laws is plenary, except in so far as the Constitution has limited it.—*State ex rel. Anaconda Copper Mining Co. v. Clancy*, 529.

Extraordinary Sessions—Powers—Limitation—Governor's Call.

2. When convened in extraordinary session, the power of the legislature is as absolute as when convened in regular session, except that it is then limited to enacting laws affecting those subjects only that are enumerated in the governor's call, or in his message.—*State ex rel. Anaconda Copper Mining Co. v. Clancy*, 529.

Extraordinary Sessions—Governor's Proclamation—Rule of Interpretation.

3. In order to determine whether legislation passed at an extraordinary session of the legislature is germane to the subjects specified in the governor's proclamation, as required by Constitution, Article XI, Section 11, it is incumbent on the court to examine the proclamation as a whole, giving to the language used its ordinary meaning, and a rule of liberal interpretation should be applied, to the end that the legislation be operative.—*State ex rel. Anaconda Copper Mining Co. v. Clancy*, 529.

Extraordinary Sessions—Legislation Germane to Governor's Call.

4. A proclamation of the governor convened the legislature in extra session in December, 1903, for the purpose of enacting general legislation by which the bias and prejudice of district judges should be made a disqualification of such judges to try any case that may come before them, as well as legislation making suitable provision for the trial of such case or cases in such event. The legislature met and passed the Act of December 10, 1903, amending Code of Civil Procedure, Section 180, so as to provide that, on the filing of an affidavit of prejudice against a district judge, he should no longer act, and also amending Section 615, so as to provide that in such case, if a qualified judge should be called to try the cause within thirty days after such disqualification, no change of venue therefor should be had. *Held*, that such legislation was germane to the governor's call, as required by Constitution, Article VII, Section 11.—*State ex rel. Anaconda Copper Mining Co. v. Clancy*, 529.

Courts—Discretion—Jurisdiction.

5. The legislature may deprive a court of discretion in the exercise of its jurisdiction.—*State ex rel. Anaconda Copper Mining Co. v. Clancy*, 529.

Constitutionality of Enactments.

6. Before the court will declare solemn legislative enactments invalid, their unconstitutionality must be established beyond a reasonable doubt.—*State ex rel. Anaconda Copper Mining Co. v. Clancy*, 529.

Unwise or Vicious Legislation—Validity.

7. Courts cannot hold legislation invalid merely because it is unwise, or under it great wrongs may be perpetuated, or even because the measure itself is vicious.—*State ex rel. Anaconda Copper Mining Co. v. Clancy*, 529.

LICENSES.

See MUNICIPAL CORPORATIONS, 2.

LIMITATIONS.

Pleadings—Answer.

1. Under the express provision of Code of Civil Procedure, Section 558, the objection that an action was not commenced within the time limited by law can be taken only by answer.—*Grogan v. Valley Trading Co.*, 229.

Action Concerning Real Estate.

2. Code of Civil Procedure, Section 518, providing that an action "for relief not hereinbefore provided for" must be commenced within five years, does not apply to actions concerning real estate.—*Grogan v. Valley Trading Co.*, 229.

MANDAMUS.

Substitution of Attorneys—Discretion.

1. Where, from the facts stated on an application for the substitution of attorneys, it was the plain legal duty of the court to grant the application, and was without its proper discretion to refuse the same, the applicant was entitled to *mandamus* to compel the court to grant such application.—*State ex rel. Davis v. District Court*, 8.

Discretionary Writ—Furtherance of Justice.

2. *Mandamus* is a discretionary writ and will be allowed only in furtherance of justice upon a proper case presented.—*State ex rel. Donovan v. Barret*, 203.

State Officers—Appropriations.

3. The writ of mandate will not be allowed to compel the state treasurer to pay a warrant issued by the state auditor, when the money particularly appropriated by the legislature for such purpose has been exhausted.—*State ex rel. Donovan v. Barret*, 203.

Municipal Corporations—Telephone Lines—Right to Use Streets.

4. Under Civil Code, Section 1000, municipalities can only reasonably regulate the construction of telephone lines within their limits, they cannot entirely prohibit such construction as is named in the statute; hence, where a city council refuses to designate the location of poles for a telephone line, and requires the wires to be laid in conduits four feet under the streets, the proper remedy is by *mandamus* to compel the council to designate the location of the poles.—*State ex rel. Rocky Mt. Bell Tel. Co. v. Mayor et al.*, 338.

MASTER AND SERVANT.

See NEGLIGENCE, 1, 2, 3, 4.

See BURDEN OF PROOF, 1, 2.

See NONSUIT, 3, 4, 5, 6.

Action for Personal Injuries—Nonsuit—Contributory Negligence.

1. In an action for injuries to a servant, alleged to have resulted from the master's failure to provide a safe place for plaintiff to work, evidence reviewed, and *held* not to justify a nonsuit on the ground that it conclusively showed plaintiff to have been guilty of contributory negligence, or that plaintiff assumed the risk.—*Nord v. Boston & Mont. Con. C. & S. M. Co.*, 48.

Safe Place to Work.

2. It is the duty of an employer to use all reasonable care, considered in relation to the kind of business, to provide a safe place in which the employe may perform his service.—*McCabe v. Montana Central Ry. Co.*, 323.

Railroad Employes—Presumptions—Safe Appliances.

3. A railroad employe engaged in switching is entitled to rely on the presumption that the railroad has properly constructed its line and appliances.—*McCabe v. Montana Central Ry. Co.*, 323.

Railroad Employes—Notice—Conclusiveness.

4. The fact that a railroad employe went in and out of the yards in which he was employed during a period of three months, and that immediately before the accident he threw switches, was not conclusive on the question of notice to him of the proximity of the switch stand to the track.—*McCabe v. Montana Central Ry. Co.*, 323.

Railroads—Not Insurers of Safety of Employes—Safe Appliances.

5. A railroad is not an insurer of the safety of its employes, but is required only to exercise all reasonable care to provide and maintain safe, sound and suitable machinery, roadway structures and instrumentalities.—*McCabe v. Montana Central Ry. Co.*, 323.

Railroads—Contributory Negligence.

6. Where a railroad negligently maintained a switch stand so near its track as to imperil the safety of its employes, and an injured employe testified that he did not know of such dangerous proximity, and had never thrown the switch prior to the day of the accident, and up to that day had never done any switching in the portion of the yard in which such switch stand stood, it could not be said, as a matter of law, that he was guilty of contributory negligence in attempting to mount an engine near the switch.—*McCabe v. Montana Central Ry. Co.*, 323.

Assumption of Risk—Contributory Negligence.

7. Where a servant assumes the risk, the question of his contributory negligence is immaterial.—*McCabe v. Montana Central Ry. Co.*, 323.

Railroad Employees—Assumption of Ordinary Risks.

8. While the occupation of a freight brakeman is a perilous one, and those who engage in it must be held to have anticipated its dangers, and to have assumed the risks ordinarily incident thereto, yet they assume only the ordinary risks of the employment, and not extraordinary ones, unless they are aware of such at the time of their employment, or, on learning of their existence, they continue in the employment after the lapse of a reasonable time for the defects to be remedied or removed.—*McCabe v. Montana Central Ry. Co.*, 323.

Railroad Employees—Assumption of Risk—Question for Jury.

9. Whether a freight brakeman engaged in switching, and who was injured while mounting an engine by coming in contact with a switch stand placed near the track, knew or should have known of the dangerous proximity of such switch stand to the track, so as to have assumed the risk of injury therefrom, *held*, under the evidence, a question for the jury.—*McCabe v. Montana Central Ry. Co.*, 323.

MECHANIC'S LIEN.

Identification of "Property"—Description of "Land."

1. The "property" to be identified under Section 2131, Code of Civil Procedure, is the building or improvement on which the lien is given, and hence a specific description of the "land" is not required.—*Western Iron Works v. Montana Pulp & Paper Co.*, 550.

Description of Building—Sufficiency.

2. Where, in proceedings to foreclose a mechanic's lien, the record disclosed that the building sought to be charged was monumental in character, easily distinguishable, and known as the paper mill of a particular corporation, and that no other mill or building of like character or description existed in the town, a notice of lien describing the property as "that certain two-story brick mill building, etc., with the lot or lots on which the same is situated, comprising portions of the following," including a general description of certain blocks in the townsite of such town and certain real estate outside of the same, was sufficient.—*Western Iron Works v. Montana Pulp & Paper Co.*, 550.

Notice of Lien—Description of Land—Excess of Statutory Amount.

3. Where a notice of a mechanic's lien, after describing the building on which the lien was claimed, added a description of land, in addition to that covered by the building, largely in excess of the statutory amount on which the lien might be foreclosed, such defect was not fatal to the lien; the amount to which the claimant was entitled being subject to adjudication in the proceedings for the enforcement of the lien.—*Western Iron Works v. Montana Pulp & Paper Co.*, 550.

Number of Contracts Under Which Materials Furnished—Question of Fact.

4. In proceedings to foreclose a mechanic's lien, the question whether the materials were furnished and the labor was performed under one general

contract, or under separate contracts, is one of fact.—*Western Iron Works v. Montana Pulp & Paper Co.*, 550.

Evidence—Findings—Sufficiency.

5. In a proceeding to foreclose a mechanic's lien, evidence reviewed, and held to sustain a finding that the materials and labor were furnished under a single contract on an open, continuous account.—*Western Iron Works v. Montana Pulp & Paper Co.*, 550.

Mortgages—Priority—Bona Fide Purchaser.

6. Where a mortgage was executed subsequent to the furnishing of materials and labor, for which a lien was claimed on the mortgaged property, the mortgagee, by purchase of the property on foreclosure of the mortgage, did not become a *bona fide* purchaser, but was substituted only to the rights of the mortgagor, and took the property subject to the mechanic's lien, under Code of Civil Procedure, Section 2133.—*Western Iron Works v. Montana Pulp & Paper Co.*, 550.

MINES.

Lease—Indemnity—Evidence

1. In an action by the lessees of a mining claim on an alleged agreement to pay them \$8,000 to indemnify them for expenses incurred in case the lessor should compromise an adjoining owner's suit for possession of a mine, or should sell the mining claim, the lessor's testimony that he sold the claim, together with other mining property, for \$2,500, was admissible.—*McMillan v. Frank*, 61.

Suit for Possession—Evidence.

2. Where the lessees of a mining claim showed that a suit against the lessor for possession of a mine in the claim was ordered dismissed as settled, the lessor's testimony that he knew nothing about a compromise of the suit, and did not know it was dismissed as settled, was admissible.—*McMillan v. Frank*, 61.

Indemnity—Suit by Adjoining Owners—Evidence.

3. In an action against the lessor of a mining claim on an alleged agreement to indemnify the lessees for expense in working a mine thereon in case an adjoining owner's suit for possession of the mine should be compromised, or the claim sold, where the witnesses for the lessees, in the examination in chief, purported to give the entire conversation on which their claim of a contract was based, testimony in rebuttal as to whether the promises to indemnify the lessees were made dependent on finding that the apex of the mine in the lessor's claim was properly excluded.—*McMillan v. Frank*, 61.

Apex—Leases—Consideration.

4. Where a mine worked by lessees of a claim had its apex in an adjoining claim, the lessor was under no obligation to protect them against a suit of the adjoining owner for possession of the mine, and his promise to do so is not binding, unless supported by some other consideration than the covenants of the lease.—*McMillan v. Frank*, 61.

Injunction—Contempt—Evidence.

5. Plaintiff in an action for an injunction to restrain trespass on a mining claim alleged that another cause of action, which was stricken from the

complaint, was for damages for trespasses on veins lying south of the vein with reference to which injunction was sought, and the court found all the issues for plaintiff. On a subsequent proceeding to punish defendants for violation of the injunction the evidence showed that the veins with reference to which the injunction was alleged to have been disobeyed were the only ones south of the vein involved in the injunction suit. *Held*, that the title to these veins was not determined by the injunction suit.—*State ex rel. Boston & Mont. Con. C. & S. M. Co. v. District Court*, 96.

Injunction—Contempt—Title to Veins.

6. Contempt proceedings for violation of an injunction restraining trespasses on mining property cannot be resorted to for the purpose of determining the title to veins, the ownership of which was not determined in the injunction suit.—*State ex rel. Boston & Mont. Con. C. & S. M. Co. v. District Court*, 96.

Location—Requirements of State Statutes—Constitutionality.

7. *Held*, in view of the former decisions of this court, that Political Code, Sections 3610 *et seq.*, providing additional requirements for valid locations of mining claims to those required by the Acts of Congress, are not in violation of the U. S. Constitution and Acts of Congress (though the court entertains serious doubts as to the correctness of its former rulings in this matter).—*Mares v. Dillon*, 117.

Declaratory Statement—Verification on Information.

8. In the absence of proof tending to impeach the truth of the facts stated in a declaratory statement for a mining claim, it is immaterial to an adverse locator that the declaration was verified on information only.—*Mares v. Dillon*, 117.

Verification of Statement by "Oath of the Locator."

9. That the locator of a mining claim verified the declaratory statement on information only, instead of on his personal knowledge, did not render the statement void under Political Code, Section 3612, requiring such declaratory statement to be verified by the "oath of the locator."—*Mares v. Dillon*, 117.

Adverse Claims—Other Action Pending.

10. Defendant filed an application for a patent of a mining claim, the survey of which conflicted at different points with two locations made by plaintiff, known respectively as the "G. H." and "G. R. H." claims, neither of which conflicted with the other. Plaintiff filed an adverse claim on behalf of each of his claims, and afterwards brought a separate suit in support of each, and defendant, in answering the suit on the G. H. claim, referring to the action brought on the G. R. H. claim, alleged that in that action no claim was made to any portion of defendant's location by virtue of plaintiff's alleged ownership of the G. H. claim. *Held*, that plaintiff's actions were separate and distinct, and therefore the pendency of the one was no bar to the other.—*Mares v. Dillon*, 117.

Adverse Claims—Form of Action.

11. Since U. S. Rev. St. Sec. 2326 (U. S. Comp. St. 1901, p. 1430), providing that an adverse claimant to a mining claim, within thirty days after filing his claim, must commence proceedings in a court of competent jurisdiction to determine the right of possession, etc., does not prescribe the form

of action, the character of the suit to be brought thereunder depends on state practice.—*Mares v. Dillon*, 117 .

Adverse Claims—Suit in Equity—Finding by Jury.

12. U. S. Rev. St. Sec. 2326, as amended by Act March 3, 1881, c. 140, 21 Stat. 505 (U. S. Comp. St. 1901, p. 1430), providing that, if title to the ground in controversy in an action to establish an adverse claim to a mining location shall not be established by either party, the jury shall so find, does not require that such finding should be by a jury, where the suit to determine the adverse claim is in equity.—*Mares v. Dillon*, 117 .

Adverse Claims—Possession—Suit in Equity.

13. Code of Civil Procedure, Section 1310, provides that an action may be brought by any person against another, who claims an estate or interest in real property adverse to him, to determine such adverse claim; and Section 1322 declares that, in an action to determine the respective rights of claimants to the possession of a mining claim, it is immaterial which party is in possession, and that it is sufficient if it appears from the pleadings that an application for a patent has been made and an adverse claim filed and allowed, and requires the verdict or decision to find which party is entitled to possession of the premises. *Held*, that where the complaint in an action to determine an adverse claim to a mining location set up the filing of plaintiff's adverse claim, as provided by Section 1322, after defendant had applied for a patent, and prayed that defendant be required to set forth the nature of his claim to the ground, and that all adverse claims of defendant might be determined by the judgment of the court, and the answer denied plaintiff's ownership and possession, and prayed that defendant be adjudged to be the owner and entitled to possession of the premises sued for, the suit was one of equitable cognizance, and not an action at law.—*Mares v. Dillon*, 117.

Adverse Claim—Suit in Equity—Estoppel—Verdict.

14. Where, on a trial of a suit to determine an adverse claim to a mining location, a jury was not demanded by either party, and the court tried the case as a suit in equity, without objection by defendant, the latter was estopped to object for the first time on appeal that the action was one at law, and that he was entitled to the verdict of the jury as to which, if either, party was entitled to possession of the ground in question.—*Mares v. Dillon*, 117.

Adverse Claim—Estoppel—Instructions to Jury.

15. Where, in a suit to determine an adverse claim to a mining location, defendant was estopped to deny that the suit was equitable in its character, he could not object to instructions to the jury.—*Mares v. Dillon*, 117.

Adverse Claim—Conflict.

16. Where, in an action in support of an adverse claim to a mining location, the only part of the surface of the ground of plaintiff's location affected by the suit was that part which was in conflict with the surface of defendant's location, for which a patent had been applied for, the court's jurisdiction was limited to the extent of the conflict, and hence it was error for the court to render judgment determining the validity of a portion of plaintiff's location outside of the points of conflict.—*Mares v. Dillon*, 144.

Adverse Claim—Costs.

17. Disbursements for filing an adverse claim to a mining location in the land office for surveying, the making of a plat, and for an abstract of title for use in the land office, were not taxable as costs under Code of Civil Procedure, Section 1866, authorizing taxation of disbursements for matters to be used in the trial of the cause.—*Mares v. Dillon*, 144.

Paramount Right—Extent of Owner's Title.

18. The owner of a mining claim is entitled *prima facie* to everything beneath the surface of his claim, and under such title may prevent the intrusion of any one not showing a paramount right to enter within the planes of his boundaries.—*Maloney v. King et al.*, 158.

Burden of Proof—Evidence—Rebuttal.

19. Code of Civil Procedure, Section 1080, as amended by Session Laws of 1901, p. 160, provides that the party on whom the burden of the issues rests must first produce his evidence, and the adverse party must then produce his evidence, and that the parties will then be confined to rebutting evidence. In an action by the owners of a mining claim for removal of ore from within its boundaries, the issue was the location of the point at which a certain vein departed from a side line of defendant's location. Defendants, after plaintiffs showed a taking of ore from within their boundaries, introduced evidence that the vein departed at the point as claimed by them, whereupon plaintiffs in rebuttal introduced evidence that the vein departed at the place claimed by them as shown by the fact that the vein was exposed in the cellar of a certain building. *Held*, that it was error not to permit defendants to show in rebuttal that the vein located in the cellar was along a course or strike which would bring it out at a point other than claimed by plaintiffs.—*Maloney v. King et al.*, 158.

Removal of Ore—Action for Damages—Instructions.

20. In an action for damages sustained by plaintiffs, owing to defendants having removed ore from within the boundaries of plaintiffs' location, an instruction that if defendants had carried away ores belonging to plaintiffs, and in so doing they were mixed with other ores to which defendants were entitled, so that the amount of each could not be ascertained, plaintiffs were entitled to recover the value of all ores taken with which the ores belonging to plaintiffs were mixed, was erroneous.—*Maloney v. King et al.*, 158.

Action for Damages—Removal of Ore—Burden of Proof.

21. In an action for damages sustained by plaintiffs owing to the removal of ores from their mining location, plaintiffs having shown *prima facie* the amounts taken, it was then incumbent on defendants to show that they took a less quantity than plaintiffs' proof tended to show.—*Maloney v. King et al.*, 158.

Adverse Claim—Pleadings.

22. A complaint under Rev. St. U. S. Sec. 2326, showing possession under claim of title in plaintiff, an application for a patent by defendant, the filing and allowance of an adverse claim in the land office, and that the action was commenced within thirty days after the allowance, is sufficient, whether the action be treated as one under Code of Civil Procedure, Section 1310 or Section 1322. It is not necessary in either case that plaintiff particu-

larly set forth the nature of defendant's claim, but that duty devolves on defendant.—*Woody v. Hinds et al.*, 189.

Adverse Claim—Pleadings—Amendment.

23. Under Rev. St. U. S. Sec. 2326, providing that adverse claimants of mineral land shall, within thirty days after filing their claim, commence proceedings in a competent court to determine the right of possession, an action commenced within the thirty days proceeds to judgment as other actions, and the court, as in other actions, may permit amendments to the complaint so as to make it state a cause of action, even after the thirty days have expired.—*Woody v. Hinds et al.*, 189.

Adverse Claim—Pleadings—Ambiguity.

24. An allegation in a complaint under Rev. St. U. S. Sec. 2326, providing that adverse claimants of mineral land shall, within thirty days after filing "a claim," sue to determine the right of possession, is not bad for uncertainty or ambiguity, when it states that a "protest" was also filed.—*Woody v. Hinds et al.*, 189.

Inspection and Survey—Action Pending—Pleadings.

25. Where an action was brought to have defendant declared a trustee for the benefit of plaintiff of an interest in mining property, and, after an application for inspection had been filed, plaintiff amended his complaint, without changing the theory of the cause of action or the issues, except that the particulars of the negotiations and the resulting agreements by which plaintiff acquired rights in the property were in some respects different from those stated in the original complaint, the amendment did not necessitate that the proceeding for inspection should be begun *de novo*.—*State ex rel. Boston & Mont. Con. C. & S. M. Co. v. District Court*, 206.

Inspection—Demand—Notice.

26. Where defendant appeared and resisted a motion for an inspection on its merits, without objecting that the required formalities of demand and notice had not been fully complied with, and it appeared that the action in which the evidence sought was to be used was then pending, and that such evidence was not in plaintiff's possession, but was under defendant's control, and related to the merits of the action, defendant could not object that the order for such inspection was prematurely made.—*State ex rel. Boston & Mont. Con. C. & S. M. Co. v. District Court*, 206.

Inspection—Affidavits.

27. Where, in an action to have defendant declared a constructive trustee of an interest in mining property, plaintiff applied for an inspection of certain books and papers, together with defendant's workings of the mine, and defendant appeared at the hearing and filed a counter affidavit which controverted none of the statements contained in plaintiff's affidavit as to the existence of the letters and other documents, defendant's possession thereof, or that they related to the merits of the action, but only denied that defendant was in possession of such records, etc., "within the state of Montana," it was no objection that the affidavits on which plaintiff's application was based were on information and belief.—*State ex rel. Boston & Mont. Con. C. & S. M. Co. v. District Court*, 206.

Inspection—Evidence—Pending Action.

28. Where, on an application for inspection of books and papers, it appeared that the evidence sought was desired for use in a pending action,

and that it was in defendant's possession, and related to the merits of the action stated by plaintiff, it was not a prerequisite to the granting of such application that plaintiff should also show that the evidence could not be obtained from other sources.—*State ex rel. Boston & Mont. Con. C. & S. M. Co. v. District Court*, 206.

Limitation of Inspection.

29. Where, in an action to have defendant declared a constructive trustee of a certain interest in mining property, plaintiff claimed that he had been deprived of the same by reason of a fraudulent conspiracy by defendant and certain others, by means of which defendant acquired title to the property, an order for inspection of defendant's books and papers with reference to such property should have been limited to such of the correspondence between defendant's executive officers and its agents through whom the purchase of the property was made as related to the acquisition of the title to such property.—*State ex rel. Boston & Mont. Con. C. & S. M. Co. v. District Court*, 206.

Inspection—Limitation—Access—Issues.

30. An order granting inspection of the underground workings of a mining claim should determine and fix the means of access, and strictly limit the examination to the workings of which it is necessary for plaintiff to have knowledge in order to make surveys and maps to elucidate the issues in controversy.—*State ex rel. Boston & Mont. C. & S. M. Co. v. District Court*, 206.

Inspection—Cost—Evidence.

31. Under Code of Civil Procedure, Section 1317, requiring plaintiff to pay the cost of an inspection of the underground workings of mining property in controversy, an order granting such an inspection, and arbitrarily fixing the amount to be paid by plaintiff to defendant for lowering and hoisting plaintiff's agents engaged in such inspection at a certain sum, without hearing any evidence as to the actual cost, was erroneous.—*State ex rel. Boston & Mont. Con. C. & S. M. Co. v. District Court*, 206.

Inspection—Expenses—Taking Property Without Compensation

32. Under Code of Civil Procedure, Section 1317, requiring the applicant for an inspection of mining property to pay all the expenses of examination, etc., an order requiring defendant to use its appliances to lower and raise plaintiff's agents in making such inspection, and providing the amount to be paid therefor, was not objectionable as taking or damaging defendant's property without just compensation.—*State ex rel. Boston & Mont. Con. C. & S. M. Co. v. District Court*, 206

Corporations—Sale of Corporate Property.

33. In a suit by a minority stockholder of a mining corporation to restrain the sale of the corporate property, *held*, as to a mining corporation organized between 1889 and 1898, the authority conferred on such corporation to sell its property by Laws of 1899, page 113 (commonly known as "House Bill 132") was not violative of the Federal Constitution (Art. I, Section 10) and the Constitution of the State of Montana (Art. III, Section 11), as impairing the obligation of contracts.—*Allen v. Ajax Mining Co. et al.*, 490.

Taxation—Surface—Use for Other Purposes Than Mining.

34. Constitution, Article XII, Section 3, and Political Code, Section 3672, declare that all mines and mining claims, after purchase from the govern-

Municipal Corporations—Telephone Lines—Right to Use Streets.

4. Under Civil Code, Section 1000, municipalities can only reasonably regulate the construction of telephone lines within their limits, they cannot entirely prohibit such construction as is named in the statute; hence, where a city council refuses to designate the location of poles for a telephone line, and requires the wires to be laid in conduits four feet under the streets, the proper remedy is by *mandamus* to compel the council to designate the location of the poles.—*State ex rel. Rocky Mt. Bell Tel. Co. v. Mayor et al.*, 338.

MASTER AND SERVANT.

See NEGLIGENCE, 1, 2, 3, 4.

See BURDEN OF PROOF, 1, 2.

See NONSUIT, 3, 4, 5, 6.

Action for Personal Injuries—Nonsuit—Contributory Negligence.

1. In an action for injuries to a servant, alleged to have resulted from the master's failure to provide a safe place for plaintiff to work, evidence reviewed, and *held* not to justify a nonsuit on the ground that it conclusively showed plaintiff to have been guilty of contributory negligence, or that plaintiff assumed the risk.—*Nord v. Boston & Mont. Con. C. & S. M. Co.*, 48.

Safe Place to Work.

2. It is the duty of an employer to use all reasonable care, considered in relation to the kind of business, to provide a safe place in which the employe may perform his service.—*McCabe v. Montana Central Ry. Co.*, 323.

Railroad Employes—Presumptions—Safe Appliances.

3. A railroad employe engaged in switching is entitled to rely on the presumption that the railroad has properly constructed its line and appliances.—*McCabe v. Montana Central Ry. Co.*, 323.

Railroad Employes—Notice—Conclusiveness.

4. The fact that a railroad employe went in and out of the yards in which he was employed during a period of three months, and that immediately before the accident he threw switches, was not conclusive on the question of notice to him of the proximity of the switch stand to the track.—*McCabe v. Montana Central Ry. Co.*, 323.

Railroads—Not Insurers of Safety of Employes—Safe Appliances.

5. A railroad is not an insurer of the safety of its employes, but is required only to exercise all reasonable care to provide and maintain safe, sound and suitable machinery, roadway structures and instrumentalities.—*McCabe v. Montana Central Ry. Co.*, 323.

Railroads—Contributory Negligence.

6. Where a railroad negligently maintained a switch stand so near its track as to imperil the safety of its employes, and an injured employe testified that he did not know of such dangerous proximity, and had never thrown the switch prior to the day of the accident, and up to that day had never done any switching in the portion of the yard in which such switch stand stood, it could not be said, as a matter of law, that he was guilty of contributory negligence in attempting to mount an engine near the switch.—*McCabe v. Montana Central Ry. Co.*, 323.

etc., in settlement of the rights of the parties without litigation, was not based on a sufficient consideration to support a suit for specific performance under Civil Code, Section 4417, providing that specific performance cannot be enforced against a person unless he has received an "adequate" consideration for the contract.—*Traphagen v. Kirk*, 562.

MORTGAGES.

See BUILDING & LOAN ASSOCIATIONS, 1, 2.

Deed Absolute on Face—Release.

1. Where a deed absolute on its face is given as security for a debt, and the grantee gives a bond for a reconveyance on payment of the debt, the transaction is a mortgage, which the debtor is entitled, on payment of the debt, to have released by reconveyance.—*Grogan v. Valley Trading Co.*, 229.

Deed Absolute on Face—Equity Jurisdiction.

2. Where a deed absolute on its face was given as security for a debt, in an action to redeem, the court of equity will determine plaintiff's right of possession, where the defendant makes no claim to possession except under the deed.—*Grogan v. Valley Trading Co.*, 229.

Redemption—Laches.

3. Under Civil Code, Section 3780, providing that a party having an interest in property subject to a lien may redeem at any time after the claim is due and before his right of redemption is foreclosed, where no proceedings were ever instituted for foreclosure of a mortgage, the mortgagor, in bringing an action to redeem four years after the mortgagee went into possession, was not guilty of such laches as to deprive him of the right to relief.—*Grogan v. Valley Trading Co.*, 229.

Reconveyance—Theory of Complaint.

4. Where a complaint alleged that a deed was given as security for a debt with certain chattel mortgages, and bond given for reconveyance on payment of the debt, that the transaction was a mortgage, and that the debt had been paid, and asked that the mortgage be canceled and satisfied, by reconveyance of the property, a decree requiring a reconveyance was not a departure from the theory of the complaint, as awarding specific performance of the bond, since the bond merely constituted a part of the transaction with the other instruments.—*Grogan v. Valley Trading Co.*, 229.

Recording.

5. Proof that a mortgage is of record is not proof that the mortgagee procured it to be recorded.—*Swain v. McMillan*, 433.

"Deed of Release."

6. The phrase "deed of release," as used in Civil Code, Section 3845, means a writing, duly subscribed and acknowledged by the mortgagee, whereby he absolves the mortgaged property from the lien of the mortgage.—*Swain v. McMillan*, 433.

Mechanic's Liens—Priority—Mortgagee—*Bona Fide* Purchaser.

7. Where a mortgage was executed subsequent to the furnishing of materials and labor, for which a lien was claimed on the mortgaged property,

the mortgagee, by purchase of the property on foreclosure of the mortgage, did not become a *bona fide* purchaser, but was substituted only to the rights of the mortgagor, and took the property subject to the mechanic's lien, under Code of Civil Procedure, Section 2133.—*Western Iron Works v. Montana Pulp & Paper Co.*, 550.

MUNICIPAL CORPORATIONS.

Ordinances—Pawnshop—Regulation of Hours of Business.

1. An ordinance making it unlawful to keep open a pawnshop after 6 o'clock p. m. is not a prohibition of the business, but a regulation of it, authorized by Political Code, Section 4800, Subd. 16.—*City of Butte v. Paltrovich*, 18.

Licenses—Notice.

2. One taking a license to carry on the pawnshop business, which states nothing as to the hours within which the business may be conducted, takes with notice that the city may impose reasonable regulations therefor.—*City of Butte v. Paltrovich*, 18.

Discrimination—Equal Protection of the Law.

3. It is only where persons engaged in the same business are subjected to different restrictions, or are granted different privileges under like conditions, that the discrimination is open to the objection that it is a denial of equal protection of the law.—*City of Butte v. Paltrovich*, 18.

Ordinances—Equal Protection of the Law.

4. An ordinance does not deny the equal protection of the law because regulating the hours of operating pawnshops, loan offices and second-hand stores, only.—*City of Butte v. Paltrovich*, 18.

Police Power—Public Good.

5. In the exercise of the "police power," citizens may, for the public good, be constrained in their conduct with reference to matters in themselves lawful and right.—*City of Butte v. Paltrovich*, 18.

Reasonableness of Ordinances—Regulation of Hours of Business.

6. An ordinance making it unlawful to keep open a pawnshop, loan office or second-hand store after 6 o'clock p. m., except on days preceding a holiday, when they may be kept open till 10 o'clock p. m., will, in the absence of clear proof to the contrary, be held reasonable.—*City of Butte v. Paltrovich*, 18.

Street Improvements—Ordinances—Expenses—Due Process of Law.

7. Session Laws 1897, p. 219, Section 30, providing that when a street improvement is made the city council shall enact by ordinance that the expense shall be paid by the entire district created as previously provided, according to area, is not unconstitutional as depriving the property owner of his property without due process of law, in that such provision is a legislative declaration that all property in the proposed district is benefited by the improvement, and to the same extent.—*McMillan v. City of Butte*, 220.

Assessment—Taking Property Without Compensation.

8. In the absence of proof that the burden imposed on a property owner by a municipal assessment is altogether out of proportion to the benefit actu-

ally accruing to the property, he cannot assert that his property is thereby taken without compensation.—*McMillan v. City of Butte*, 220.

Assessment—Street Improvements—Description of Lot.

9. Where a certain lot was assessed for municipal improvements for its entire area, the fact that only half of such lot was included in the description in the resolution creating the assessment district was immaterial.—*McMillan v. City of Butte*, 220.

Street Improvements—Protest.

10. An alleged protest to street paving, filed by abutting owners, stating the reasons why they did not desire the paving done during the year 1898, and stating that they were willing to have the street paved during the year 1900, and that payment therefor should be required in three annual installments was not an unqualified protest to the paving required by Session Laws of 1897, p. 210, Section 31.—*McMillan v. City of Butte*, 220.

Officers' Bonds—Conditions.

11. The official bond of a city treasurer, as contemplated by the Political Code, is within the purview of Article IX thereof, and must be conditioned in accordance with Section 1057.—*City of Phillipsburg v. Degenhart*, 299.

City Treasurer—Illegality of Collection of Money—Liability of Sureties.

12. A city treasurer receipted for moneys collected by officers and agents of the city from gambling houses and brothels, and also included such receipts in his monthly reports to the council. *Held*, that the money so received was received by the treasurer by virtue of his office, and his failure to pay over the money to his successor in office was a breach of his official bond, for which his sureties were liable, though the money was collected illegally and without authority.—*City of Phillipsburg v. Degenhart*, 299.

Reports of Treasurer—Evidence.

13. Reports of a city treasurer to the city council of moneys received and disbursed during the month, which he is required to make by Political Code, Section 4788, may be given in evidence against the sureties on his official bond, and are *prima facie* true, and, when not contradicted by the sureties, are binding on them.—*City of Phillipsburg v. Degenhart*, 299.

Telephone Lines—Powers—Streets—Public Roads.

14. Civil Code, Section 1000, authorizes telephone corporations to construct their lines along and upon the streets of cities, since the term "public roads" includes "streets" of cities.—*State ex rel. R. M. Bell Tel. Co. v. Mayor et al.*, 338.

Statutes—Government of Cities.

15. Civil Code, Section 1000, being a general law passed in pursuance of Constitution, Article XV, Section 14, is not modified or limited by the laws relating to the government of cities.—*State ex rel. R. M. Bell Tel. Co. v. Mayor et al.*, 338.

Statutes—Powers—Streets—Sidewalks.

16. Civil Code, Section 1000, is not in conflict with, nor amended by, subsequent enactments granting the power to cities to regulate and prevent the use or obstruction of city streets, sidewalks and public grounds.—*State ex rel. R. M. Bell Tel. Co. v. Mayor et al.*, 338.

Mandamus—Right to Use of Streets—Telephone Lines.

17. Under Civil Code, Section 1000, municipalities can only reasonably regulate the construction of telephone lines within their limits, they cannot entirely prohibit such construction as is named in the statute, hence, where a city council refuses to designate the location of poles for a telephone line, and requires the wires to be laid in conduits four feet under the streets, the proper remedy is by *mandamus* to compel the council to designate the location of the poles.—*State ex rel. R. M. Bell Tel. Co. v. Mayor et al.*, 338.

Exclusive Control of Streets.

18. That a city is charged with the duty of keeping its streets in repair, and that the cost of maintaining them is raised by public taxation within the city, does not give it jurisdiction over them exclusive of that of the legislative assembly.—*State ex rel. R. M. Bell Tel. Co. v. Mayor et al.*, 338.

NEGLIGENCE.

See NONSUIT, 3, 5, 6.

See BAILMENTS, 3.

Assumption of Risk—Burden of Proof—Contributory.

1. While, in an action for injuries to a servant, the burden is on the plaintiff to prove that defendant was negligent, and that the injury complained of was the direct or proximate result of the negligence alleged, the burden is on the defendant to show that plaintiff was guilty of such contributory negligence as would prevent his recovery, or that plaintiff assumed the risk of the employment.—*Nord v. Boston & Mont. Con. C. & S. M. Co.*, 48.

Contributory—Assumption of Risk.

2. Though the burden is on the master, in an action for injuries to his servant, to prove contributory negligence or assumption of risk, if the existence of such defense is disclosed by plaintiff's witnesses, defendant is entitled to the same advantage thereof as though proven on his part.—*Nord v. Boston & Mont. Con. C. & S. M. Co.*, 48.

Master and Servant—Nonsuit—Safe Place to Work.

3. Where, in an action for injuries to a servant, the negligence alleged was defendant's failure to provide and maintain a reasonably safe place for plaintiff to work, and there was sufficient proof of such negligence to go to the jury, a variance relating merely to the details of the occurrence by which the injury was caused did not entitle defendant to a nonsuit.—*Nord v. Boston & Mont. Con. C. & S. M. Co.*, 48.

Railroads—Employes—Contributory.

4. Where a railroad negligently maintained a switch stand so near its track as to imperil the safety of its employes, and an injured employe testified that he did not know of such dangerous proximity, and had never thrown the switch prior to the day of the accident, and up to that day had never done any switching in the portion of the yard in which such switch stand stood, it could not be said, as a matter of law, that he was guilty of contributory negligence in attempting to mount an engine near the switch.—*McCabe v. Montana Central Ry. Co.*, 323.

Contributory—Assumption of Risk.

5. Where a servant assumes the risk, the question of his contributory negligence is immaterial.—*McCabe v. Montana Central Ry. Co.*, 323.

NEW TRIAL.

Newly Discovered Evidence—Continuance.

1. Code of Civil Procedure, Section 1171, authorizes the granting of a new trial for newly discovered evidence, which the moving party could not with reasonable diligence have discovered and produced at the trial. In an action to recover a loan plaintiff testified in justice's court that no one was present when the loan was made, but in the district court testified that his wife was present. Defendant asked no continuance to secure impeaching witnesses, and made no effort to that end, but himself testified to the contradiction. *Held*, that a new trial was properly refused.—*Smith v. Shook*, 30.

Newly Discovered Evidence—Affidavits.

2. The party moving for a new trial on the ground of newly discovered evidence must show by his own affidavit that the new evidence was not known to him at the time of the trial, and the affidavits of other persons on that question are not sufficient.—*Smith v. Shook*, 30.

Motion—Time for Filing Additional Affidavits.

3. Where it appears that nine affidavits relative to an alleged contradiction between the opposing party's testimony at a former and at the present trial were read in support of a motion for a new trial, it was not error to refuse to extend the time to enable the moving party to secure additional affidavits.—*Smith v. Shook*, 30.

Surprise—Newly Discovered Evidence.

4. The granting or refusing of a new trial upon the ground of surprise or newly discovered evidence rests largely in the discretion of the trial court, and its ruling will not be disturbed in the absence of an abuse of such discretion.—*Landeau v. Frazier*, 267.

Notice of Intention—Grounds.

5. Under a notice of intention to move for a new trial, specifying as grounds the insufficiency of the evidence to justify the decision of the court as regarded plaintiff, the appealing defendant could not urge an objection to the sufficiency of the evidence to sustain the decision in favor of another defendant.—*McNinch v. Crawford*, 297.

Notice of Intention—Appeal—Dismissal.

6. The fact that the notice of intention to move for a new trial is not in the record is no ground for dismissal of the appeal from the judgment.—*Fordham v. Northern Pacific Ry. Co.*, 421.

NONSUIT.

See APPEAL, 4.

See BILL OF EXCEPTIONS, 1, 4.

See BURDEN OF PROOF, 8.

Question of Law.

1. The question presented on a motion for a nonsuit is one of law.—*Nord v. Boston & Mont. Con. C. & S. M. Co.*, 48.

When Granted—Undisputed Facts.

2. A nonsuit should be granted only when the facts are undisputed and such that "all reasonable men must draw the same conclusions from them."—*Nord v. Boston & Mont. Con. C. & S. M. Co.*, 48.

Master and Servant—Contributory Negligence—Evidence.

3. In an action for injuries to a servant, alleged to have resulted from the master's failure to provide a safe place for plaintiff to work, evidence reviewed, and held not to justify a nonsuit on the ground that it conclusively showed plaintiff to have been guilty of contributory negligence, or that plaintiff assumed the risk.—*Nord v. Boston & Mont. Con. C. & S. M. Co.*, 48.

Master and Servant—Safe Place—Negligence—Variance.

4. Where, in an action for injuries to a servant, the negligence alleged was defendant's failure to provide and maintain a reasonably safe place for plaintiff to work, and there was sufficient proof of such negligence to go to the jury, a variance relating merely to the details of the occurrence by which the injury was caused did not entitle defendant to a nonsuit.—*Nord v. Boston & Mont. Con. C. & S. M. Co.*, 48.

Contributory Negligence—Assumption of Risk—Appeal—Variance.

5. Where, in an action for injuries to a servant, defendant moved for a nonsuit at the close of plaintiff's evidence, on the ground that the evidence conclusively showed that plaintiff was guilty of contributory negligence or that he assumed the risk, it could not be alleged for the first time on appeal that the nonsuit was properly granted by reason of an alleged variance between the pleading and proof.—*Nord v. Boston & Mont. Con. C. & S. M. Co.*, 48.

Motion—Presumption—Proof.

6. On motion for a nonsuit, every fact will be deemed proved which the evidence tends to prove.—*McCabe v. Montana Central Ry. Co.*, 323.

NUISANCES.

Blasting on City Lots—Exercise of Care.

1. The carrying on of blasting on premises platted as city lots, continuously for over a year, constitutes a nuisance *prima facie*, irrespective of the care exercised, and a recovery may be had for injury to property owing to concussions of the air from blasting.—*Longtin v. Persell*, 306.

OFFER OF PROOF.

See PROOF.

ORDINANCES.

See MUNICIPAL CORPORATIONS, 1, 4, 6, 7.

PARTITION.

Trustee—Attorney in Fact.

1. By agreements between defendants in partition and L., the latter agreed, by himself or agent, to buy in the property at the sale in his own name, and hold it for the former, to whom he was to reconvey the same, or a part thereof, as he should elect, on being reimbursed for the cost and expenses. One agreement was signed for one of the defendants by an attorney in fact, who afterwards bought the property at the sale in his own name, but who did not otherwise sign either agreement. *Held*, that the agreements did not establish a trust relation between the purchaser and L., who claimed that the property was bought for him.—*Largey v. Leggat*, 148.

Specific Performance—Deed—Pleadings.

2 Where it cannot be determined from either the pleadings or the evidence as to a contract to purchase property for another at a partition sale whether the purchaser was to furnish the money or not, or whether he was to take the deed in his own name or otherwise, neither would support a decree for specific performance on the part of the purchaser.—*Largey v. Leggat*, 148.

PATENTS.

See, also, PUBLIC LANDS, 1, 2, 3, 8, 9, 10, 11.

Public Lands—Preliminary Requirements.

1. A patent itself is in the nature of an official declaration by that branch of the government to which the disposition of the public lands is intrusted, that all the requirements preliminary to its issue have been complied with.—*Gebo v. Clarke Fork Coal Mining Co.*, 87.

Presumption—Proof.

2. In the absence of any showing to the contrary, the presumption will be indulged that the officials of the land department had before them sufficient proof to justify the issuing of the patent to the patentee.—*Gebo v. Clarke Fork Coal Mining Co.*, 87.

Proof of Invalidity.

3. The title conveyed by a patent will not be disturbed where the proof of its invalidity is not clear and convincing.—*Graham v. Great Falls W. P. & T. Co.*, 393.

Patentees—Trustees.

4. In an action for the purpose of having a patentee declared plaintiff's trustee for the land, before plaintiff can prevail, he must not only show that the patentee was not entitled to the patent, but also that he is.—*Graham v. Great Falls W. P. & T. Co.*, 393.

PLEADING AND PRACTICE (Civil).

Stipulation—Agreed Case—Jurisdiction.

1. Where a complaint is filed giving jurisdiction, and a stipulation is then filed, treated by the court and parties as amending the complaint and raising an issue, the case is not an agreed case, which has to be submitted with

the formalities required by Code of Civil Procedure, Section 2050 *et seq.*, to give jurisdiction.—*Bickford v. Kirwin*, 1.

Judgment—Issue Framed.

2. Judgment on the pleadings cannot be entered where there is an issue framed thereby.—*Moore v. Murray*, 13.

Denials—Sufficiency.

3. Denials which are as specific as the allegations they are intended to meet, and which controvert the spirit and substance of the adverse pleading, are sufficient to raise issues.—*Moore v. Murray*, 13.

Answer—Amendment.

4. It is not error to permit an amendment to an answer, during the progress of the trial, where the testimony necessary to support the amendment would have been admissible without it.—*McMillan v. Frank*, 61.

Demurrer—Waiver—Pleading Over.

5. Objection to a complaint, raised by demurrer, that it does not state a cause of action, is not waived by pleading over.—*Van Horn v. Holt*, 69.

Action on Injunction Bond—Complaint.

6. The complaint on an injunction bond, conditioned for payment of damages suffered by reason of the injunction, if it be decided there was no right thereto, must allege a failure to pay.—*Van Horn v. Holt*, 69.

Complaint—Fraud—Public Lands—Patent.

7. A complaint, to hold the patentee of public land a trustee thereof for plaintiff, alleging merely that plaintiff made application to purchase it as coal land, filing a declaratory statement in the land office, and went into possession and improved it; that defendant caused a forged relinquishment of plaintiff's rights to be filed in the land office, of which she did not know till five months after expiration of the time within which she might have made proof and payment, and that defendant then purchased the land, and a patent was issued to him—does not state a cause of action; it not showing that plaintiff did not also make a voluntary relinquishment, by failure to prosecute work on the land, or to make, or offer to make, seasonable proof and payment.—*Gebo v. Clarke Fork Coal Mining Co.*, 87.

Trust Relation—Trustee *Ex Maleficio*.

8. Pleadings alleging that a trust relation was created between parties in question by virtue of written agreements do not support conclusions of law declaring a party to be a trustee *ex maleficio*.—*Largey v. Leggat*, 148.

Findings Not Within Issue.

9. Findings not within the issue made by the pleadings will not support a decree.—*Largey v. Leggat*, 148.

Inconsistent Allegations—Theory of Case.

10. A plaintiff cannot in a complaint take one position, and, in a replication to defendant's answer, take another one inconsistent with the allegations of the complaint.—*Flannery v. Campbell*, 172.

Water Rights—*Res Judicata*.

11. In an action for the unlawful diversion of water by defendant, where plaintiff in her complaint admitted that defendant had allowed some of the water claimed by plaintiff to pass down to her, and that she had used it, she was not entitled to allege in her reply a plea of estoppel or *res judicata*, that defendant was estopped by his answer in a previous case, and by the judgment therein, from denying that plaintiff had been prevented from using any water.—*Flannery v. Campbell*, 172.

Mines—Adverse Claims—Sufficiency.

12. A complaint under Rev. St. U. S. Sec. 2326, showing possession under claim of title in plaintiff, an application for a patent by defendant, the filing and allowance of an adverse claim in the land office, and that the action was commenced within thirty days after the allowance, is sufficient, whether the action be treated as one under Code of Civil Procedure, Section 1310, or Section 1322. It is not necessary in either case that plaintiff particularly set forth the nature of defendant's claim, but that duty devolves on defendant.—*Woody v. Hinds et al.*, 189.

Mines—Adverse Claims—Complaint—Amendment.

13. Under Rev. St. U. S. Sec. 2326, providing that adverse claimants of mineral land shall, within thirty days after filing their claim, commence proceedings in a competent court to determine the right of possession, an action commenced within the thirty days proceeds to judgment as other actions, and the court, as in other actions, may permit amendments to the complaint so as to make it state a cause of action, even after the thirty days have expired.—*Woody v. Hinds et al.*, 189.

Mines—Adverse Claims—Ambiguity.

14. An allegation in a complaint under Rev. St. U. S. Sec. 2326, providing that adverse claimants of mineral land shall, within thirty days after filing "a claim," sue to determine the right of possession, is not bad for uncertainty or ambiguity, when it states that a "protest" was also filed.—*Woody v. Hinds et al.*, 189.

Limitations—Objection—How Taken—Answer.

15. Under the express provision of Code of Civil Procedure, Section 558, the objection that an action was not commenced within the time limited by law can be taken only by answer.—*Grogan v. Valley Trading Co.*, 229.

Corporations—Action Against Officers—Complaint—Sufficiency.

16. Though the allegations of the complaint in an action against the officers and directors of a corporation for fraudulently diverting and misappropriating its funds are not sufficient to entitle the action to be considered as brought on behalf of others than plaintiffs, who are minority stockholders, its sufficiency as an action in plaintiffs' own behalf is not impaired by averments that they bring it for others as well as themselves.—*McConnell et al. v. Combination M. & M. Co.*, 239.

Execution—Entry of Judgment—Conclusion of Law.

17. An allegation that an execution was issued before judgment was properly entered, being pregnant with the admission that judgment was in fact entered, is a mere conclusion of law, and presents no statement on which an issue of fact can be made.—*Burton v. Kipp*, 275.

Denial—Sufficiency.

18. Where affirmative matter is pleaded in an answer, a replication thereto stating that plaintiff "has no knowledge or information concerning the allegations thereof sufficient to form a belief," is insufficient as a denial, and said allegations of the answer must be deemed admitted.—*Floyd-Jones v. Anderson et al.*, 351.

Specific Performances—Complaint.

19. In an action for specific performance of a contract to convey land, it was not necessary that the complaint should allege that defendants were the owners of the land at the time the contract was made, since, if defendants were not the owners, or had placed themselves in such a position that they could not perform their contract, such facts were matters of defense.—*Christiansen v. Aldrich et al.*, 446.

Specific Performance—Answer.

20. In a suit for specific performance, an answer alleging that, since the contract was made, defendants had conveyed the land in controversy to another, constituted an admission that defendants were the owners of the land at the time the contract was made.—*Christiansen v. Aldrich et al.*, 446.

Specific Performance—Complaint—Technical Objections.

21. Under Code of Civil Procedure, Section 778, a technical objection to a complaint in a suit for specific performance not affecting the substantial rights of the parties is not available after judgment.—*Christiansen v. Aldrich et al.*, 446.

Specific Performance—Answer—Sufficiency.

22. Where, in a suit for specific performance, plaintiff pleaded a breach of the contract, and defendant alleged that plaintiff had failed to perform within the time prescribed, whereupon defendant had sold the land to W., but did not allege whether the sale to W. was before or after the commencement of the action, nor state any facts with reference to the consideration paid by W., and his notice of plaintiff's equity, the answer did not set up sufficient new matter to require replication.—*Christiansen v. Aldrich et al.*, 446.

Specific Performance—Complaint—Amendments.

23. In a suit for specific performance, plaintiff, pending a motion for judgment on the pleadings, applied for leave to amend the complaint by adding an allegation of tender of the unpaid purchase price, and a demand for a deed, and by making an allegation of readiness and willingness to perform more specific. *Held*, that the application was properly granted, defendants having declined the court's offer to postpone the hearing to the next term.—*Christiansen v. Aldrich et al.*, 446.

Amendments—Reversible Error.

24. Where, after a trial amendment, the case proceeded and was tried upon the issues formed by the amended complaint and answer, and it appeared that defendants were afforded every opportunity to present their entire case, the fact that the amendment was not formally incorporated in the complaint was not reversible error.—*Christiansen v. Aldrich et al.*, 446.

Action on Bail Bond—Complaint.

25. Constitution, Article VIII, Section 20, gives a justice court jurisdiction as an examining court in cases of felony, and Code of Civil Procedure, Section 745, declares that in pleading a judgment or other determination of a court, officer or board, it is not necessary to state the facts conferring jurisdiction, but the determination or judgment may be stated to have been "duly given or made." In an action on a bail bond the complaint alleged that a certain person was ordered by a certain justice of the peace to be held to answer on a charge of burglary, on which he was admitted to bail; the justice then and there having full authority and power to accept and approve the bond; and that he duly approved it, and ordered the release of defendant. *Held*, that the complaint was insufficient for failing to allege the jurisdictional facts that the defendant was charged by a complaint filed with the justice, and examined upon the charge, etc., or to state the judicial capacity of the justice, and that the order holding defendant to answer was "duly given" or "duly made" or "duly given and made."—*State v. Lagoni et al.*, 472.

Action on Bail Bond—Defense.

26. The fact that a magistrate accepting a bail bond failed to comply with the statute requiring it to be filed in the district court was no defense to the sureties in an action on the bond.—*State v. Lagoni et al.*, 472.

Action on Bail Bond—Defective Complaint.

27. A complaint in an action on a bail bond is fatally defective where it fails to state that the amount due by the terms of the bond has not been paid.—*State v. Lagoni et al.*, 472.

Action on Bail Bond—Forfeiture—Proof.

28. Where, in an action on a bail bond, it was shown that an information was filed against the defendant, charging him with a crime, and that he failed to appear and answer, and that the court thereupon ordered the bond forfeited, a contention that the state did not prove that an order of forfeiture was made was without merit.—*State v. Lagoni et al.*, 472.

Action on Bail Bond—Death of Principal.

29. In an action on a bail bond defendant sureties pleaded that the principal in the bond, who had disappeared, was dead, when the bond was declared forfeited, and a witness testified for defendants that he knew of the principal having attempted to commit suicide on two different occasions. *Held*, that the testimony was properly stricken as immaterial.—*State v. Lagoni et al.*, 472.

PLEADING AND PRACTICE (Criminal).

Information—Waiver—Bail Bond—Sureties.

1. Where the county attorney fails to comply with Penal Code, Section 1730, any advantage thereof must be taken by defendant by motion to set aside the information, which must be done before demurrer or plea, and failure to so take advantage of the irregularity waives it. The negligence of the county attorney in this respect cannot be taken advantage of by the sureties on defendant's bail bond.—*State v. Lagoni et al.*, 472.

Insanity—Proof.

2. Insanity cannot be proved by reputation.—*State v. Lagoni et al.*, 472.

POLICE POWER.

Constraint—Public Good.

1. In the exercise of the "police power," citizens may, for the public good, be constrained in their conduct with reference to matters in themselves lawful and right.—*City of Butte v. Paltorrich*, 18.

PRESUMPTIONS.

Public Lands—Patents—Sufficiency of Proof.

1. In the absence of any showing to the contrary, the presumption will be indulged that the officials of the land department had before them sufficient proof to justify the issuing of the patent to the patentee.—*Gebo v. Clarke Forke Coal Mining Co.*, 87.

Execution Sale—Regularity.

2. Code of Civil Procedure, Section 1227, provides that, when real property sold under execution consists of several "known lots or parcels," they must be sold separately. Section 3266 states the legal presumption that official duty has been performed. *Held*, that it must be presumed that an officer complied with the statute in the sale of a city lot, though it was composed of two parcels and was sold in gross, since the parcels may not have been known, or may have been offered separately and sold in gross only after it was found that there were no bidders for the parcels.—*Burton v. Kipp*, 275.

Master and Servant—Safe Appliances.

3. A railroad employe engaged in switching is entitled to rely on the presumption that the railroad has properly constructed its line and appliances.—*McCabe v. Montana Central Ry. Co.*, 323.

Motion for Nonsuit—Proof.

4. On motion for a nonsuit, every fact will be deemed proved which the evidence tends to prove.—*McCabe v. Montana Central Ry. Co.*, 323.

Insolvency—Question of Fact.

5. Insolvency is a question of fact to be proved by evidence, and is not presumed.—*Floyd-Jones v. Anderson et al.*, 351.

Solvency—Bankruptcy.

6. In proceedings by a trustee in bankruptcy to recover property of the bankrupt sold within four months prior to the filing of the petition, where the pleadings contained no allegation of insolvency at the date of the transfer of the property, and the record did not disclose any facts tending to show the same, the supreme court will presume that on the date of the transfer the debtor, subsequently adjudged a bankrupt, was solvent.—*Schilling v. Curran*, 370.

Findings—Evidence—Excessive Judgment.

7. Where a finding on the value of property in dispute was made, and not objected to, and the sufficiency of the evidence is not brought before the supreme court for consideration, that court will presume that the finding was sustained by the evidence, and will not consider a contention that the judgment is excessive.—*Schilling v. Curran*, 370.

Transcript on Appeal—Manner of Showing Error.

8. The transcript on appeal must show error directly, and not by way of inference or presumption.—*Sicain v. McMillan*, 433.

Justice of the Peace Courts—Regularity of Proceedings.

9. A justice's court is of inferior jurisdiction, and no presumptions are to be indulged in favor of the regularity of its proceedings.—*State v. Lagoni et al.*, 472.

Mines—Ownership of Ores Beneath Surface.

10. The presumption that an owner of the surface is also the owner of ores found beneath the surface is not overcome by the opinion of an engineer that, if a vein having its apex in ground owned by another continues to dip at the same angle as it dips where it is exposed in upper levels, it will reach the point where the owner of the surface is conducting operations.—*Heinze et al. v. Boston & Mont. Con. C. & S. M. Co.*, 484.

PROOF.

Presumptions—Public Lands—Sufficiency—Patents.

1. In the absence of any showing to the contrary, the presumption will be indulged that the officials of the land department had before them sufficient proof to justify the issuing of the patent to the patentee.—*Gebo v. Clarke Fork Coal Mining Co.*, 87.

Offer—Sufficiency—Good Faith.

2. An offer to prove is not sufficient, without having the witness present and calling him, or asking leave to call him, or without affirmatively showing that the offer is made in good faith, and with the means of doing or trying to do what is desired.—*Schilling v. Curran*, 370.

Offer—Objection—Discretion.

3. The mere fact that an objection made to an offer of proof is not good does not prevent the court from exercising its discretion and refusing to allow the offered proof.—*Schilling v. Curran*, 370.

Offer—Action on Bail Bond—Death of Principal.

4. In an action on a bail bond it appeared that the principal was charged with a felony about the middle of June, and that the case came on for trial in the following November, and defendant sureties offered to prove, in order to establish the death of their principal, that he was an old man; that on two or three occasions he had attempted suicide; that he lived in a place the surroundings of which were such that a body might lie for weeks, months and even years without discovery; that he had never been seen or heard of since about a week before the forfeiture of the bond, and that no trace had ever been found of him. *Held*, that the offer was properly denied.—*State v. Lagoni et al.*, 472.

PROHIBITION.

Contempt.

1. Writ does not lie to prohibit a district judge from hearing contempt proceedings, where an affidavit disqualifying said judge has been filed, under

the provisions of Sections 180 and 615 of the Code of Civil Procedure, as amended by Act of Second extraordinary session of the Eighth legislative assembly (1903), because "contempt proceedings were not in the legislative contemplation in passing either of them."—*State ex rel. Boston & Montana Con. C. & S. M. Co. v. Judges*, 193.

See, also, *State ex rel. Durand v. District Court*, 547.

Denial of Change of Venue—Review.

2. An order denying a motion for a change of venue can be reviewed only on appeal from final judgment, and not on an application for a writ of prohibition.—*State ex rel. Durand v. District Court*, 547.

Writ Will Lie—Disqualification of Judge.

3. Writ will lie where a district judge announced his intention to proceed with the trial of a cause, after his attention had been called to the fact that an affidavit of disqualification had been filed under the provisions of Section 180 of the Code of Civil Procedure, as amended by Act of the Second extraordinary session of the Eighth legislative assembly (1903).—*State ex rel. Anaconda Copper Mining Co. v. Clancy*, 529.

PROMISSORY NOTES.

Collection Without Suit—Attorney's Fees.

1. Under Civil Code, Section 3996, as amended (Session Laws of 1899, page 124), a note made payable with reasonable attorney's fees entitles the holder to collect such fees, where the note is not paid at maturity, and it is placed in the hands of attorneys for collection, though it is not sued.—*Morrison v. Ornbaun et al.*, 111.

Collection Without Suit—Attorney's Fees.

2. The right to collect attorney's fees pursuant to the provisions of a mortgage note, where the note is not paid and is placed in the hands of attorneys for collection, though the note is not sued, is not controlled by a stipulation in the mortgage for such fees in case of suit.—*Morrison v. Ornbaun et al.*, 111.

PUBLIC LANDS.

Patentee as Trustee—Fraud—Pleading.

1. A complaint, to hold the patentee of public land a trustee thereof for plaintiff, alleging merely that plaintiff made application to purchase it as coal land, filing a declaratory statement in the land office, and went into possession and improved it; that defendant caused a forged relinquishment of plaintiff's rights to be filed in the land office, of which she did not know till five months after expiration of the time within which she might have made proof and payment, and that defendant then purchased the land, and a patent was issued to him—does not state a cause of action; it not showing that plaintiff did not also make a voluntary relinquishment, by failure to prosecute work on the land, or to make, or offer to make, seasonable proof and payment.—*Gebo v. Clarke Fork Coal Mining Co.*, 87.

Patent.

2. A patent itself is in the nature of an official declaration by that branch of the government to which the disposition of the public lands is intrusted, that all the requirements preliminary to its issue have been complied with.—*Gebo v. Clarke Fork Coal Mining Co.*, 87.

Proof—Patent—Presumption.

3. In the absence of any showing to the contrary, the presumption will be indulged that the officials of the land department had before them sufficient proof to justify the issuing of the patent to the patentee.—*Gebo v. Clarke Fork Coal Mining Co.*, 87.

Contest—Pre-emption Entry—Cancellation.

4. *Held*, that a certain pre-emption entry was never canceled, so as to entitle the contestant to the preferential right to enter the land given to a successful contestant by Act of Congress, May 14, 1880, c. 89, Section 2.—*Graham v. Great Falls W. P. & T. Co.*, 393.

Vested Rights—Privilege.

5. The preferential right given to a successful contestant by Act of Congress, May 14, 1880, c. 89, Section 2, was not a property or vested right, nor a right which could be enforced against the government, but a mere privilege of becoming the first entryman.—*Graham v. Great Falls W. P. & T. Co.*, 393.

Bona Fide Purchasers.

6. Congress, by the passage of Act March 3, 1891 (26 Stat. 1098), providing for the confirmation of contested pre-emptions in the hands of *bona fide* purchasers, cut off the rights of successful contestants under Act of Congress, May 14, 1880.—*Graham v. Great Falls W. P. & T. Co.*, 393.

Bona Fide Purchasers—Department's Findings—Conclusive.

7. The land department's finding on the issue as to whether certain persons are *bona fide* purchasers of contested pre-emptions is conclusive on the state courts.—*Graham v. Great Falls W. P. & T. Co.*, 393.

Patents—Proof of Invalidity—Clear and Convincing.

8. The title conveyed by a patent will not be disturbed where the proof of its invalidity is not clear and convincing.—*Graham v. Great Falls W. P. & T. Co.*, 393.

Patents—Classification—Conclusive.

9. Under Act of Congress February 26, 1895, Chap. 136, Section 7, 28 Stat. 683, providing that no patent or other conveyance of title shall be delivered to the Northern Pacific Railroad Company for any lands in Montana and Idaho, under the congressional grant to such railroad, until the lands shall have been examined and classified as non-mineral by mineral land commissioners provided for, a patent to such railroad company for land classified by such commissioners as non-mineral is conclusive as to the character of the land, in the absence of fraud, imposition or mistake.—*Traphagen v. Kirk*, 562.

Mineral Lands—Location—Surface Ground.

10. In order to make a valid mining location under Rev. St. U. S. Section 2319, providing that all mineral deposits in mineral lands belonging to the United States, and the lands containing the same, shall be open to entry, etc., surface ground, including the vein or lode, must be appropriated, and such surface ground must be the property of the United States.—*Traphagen v. Kirk*, 562.

Patents—Mining Location—Trespass.

11. Where an entire section of public land had been patented by the government to the Northern Pacific Railroad Company, which had conveyed the same to defendant, an entry thereon by complainants for the purpose of making a mining location without defendant's consent was a trespass on defendant's rights, and was therefore ineffectual for the purpose of initiating a valid mining claim.—*Traphagen v. Kirk*, 562.

PUBLIC POLICY.

Surety on Appeal Bond.

1. Defendant's action in becoming a surety, when he did, was not contrary to a mandatory statute nor prohibited by public policy.—*Morin v. Wells et al.*, 76.

REAL ESTATE.

Action—Limitations.

1. Code of Civil Procedure, Section 518, providing that an action "for relief not hereinbefore provided for" must be commenced within five years, does not apply to actions concerning real estate.—*Grogan v. Valley Trading Co.*, 229.

Record—Owner in Fee—Proof.

2. Where one appears of record to be the owner in fee of real estate, one alleging the contrary must prove the same by clear and convincing proof.—*Sicain v. McMillan*, 433.

RECEIVERS.

Compensation—Appeal—New Trial.

1. No motion lies for a new trial of issues involved in the matter of a claim for compensation and expenses of a receivership, and there can be no appeal from an order denying such a motion.—*Forrester & MacGinniss v. Boston & Mont. Con. C. & S. M. Co.*, 181.

Compensation—Appeal—Judgment.

2. An appeal lies from a judgment allowing the compensation and expenses of a receiver.—*Forrester & MacGinniss v. Boston & Mont. Con. C. & S. M. Co.*, 181.

Attorney's Fees.

3. A receiver cannot be allowed fees for counsel to a superintendent in charge of the corporation's property, or for other employees.—*Forrester & MacGinniss v. Boston & Mont. Con. C. & S. M. Co.*, 181.

Unjustly Kept in Office—Expenses.

4. A defendant in a receivership should not have its property taken to pay expenses of a receiver unjustly and unlawfully kept in office as an officer of the court, where justice requires his discharge.—*Forrester & MacGinniss v. Boston & Mont. Con. C. & S. M. Co.*, 181.

Excessive Compensation.

5. Where a receiver was only in actual possession of the corporation's property for five days, and was free to act as receiver not more than fifteen

days altogether, an allowance of \$200,000 was excessive.—*Forrester & MacGinniss v. Boston & Mont. Con. C. & S. M. Co.*, 181.

Acts of Violence—No Justification for Excessive Allowance.

6. Acts of violence exhibited towards a receiver by the agents of the corporation do not justify an excessive allowance of fees to the receiver.—*Forrester & MacGinniss v. Boston & Mont. Con. C. & S. M. Co.*, 181.

Reasonable Compensation for What Period.

7. Where a receiver should have been discharged on a certain date, when defendant corporation offered, in writing, to do the very things that plaintiff prayed the court to enforce, he was entitled to a reasonable compensation for services rendered prior to such date, and to be recompensed for proper and reasonable expenses incurred prior thereto, but was entitled to nothing for expenses or services rendered after that date, except, perhaps, a reasonable sum for services of a bookkeeper aiding in rendition of accounts to the court.—*Forrester & MacGinniss v. Boston & Mont. Con. C. & S. M. Co.*, 181.

REDEMPTION.

See MORTGAGES.

REFEREES.

Erroneous Admission of Evidence—Appeal.

1. Admission of immaterial evidence in an action tried by a referee is not ground for reversal, there being sufficient competent evidence to sustain the judgment.—*Way v. Sherman*, 410.

RES JUDICATA.

See WATER RIGHTS, 1.

See PLEADING AND PRACTICE, 11.

ROBBERY.

See CRIMINAL LAW.

RULES OF DISTRICT COURTS.

Transfer of Cause—Supervisory Control—Appeal.

1. By a rule of the district court of Silver Bow county, all matters of a criminal nature were to be heard in Department 3 of that court. An accusation under Penal Code, Section 1531, was filed in Department 1, and the judge of that department denied an application for the transfer of the cause to Department 3. *Held*, that the supreme court would not issue a writ of supervisory control to compel the removal of the case to Department 3, where it did not appear that, if Department 1 should proceed to a determination of the accusation, accused would suffer an injury for which an appeal would not furnish an adequate remedy.—*State ex rel. Clark v. District Court*, 442.

SPECIFIC PERFORMANCE.

RULES OF SUPREME COURT.

Briefs—Specification of Errors.

1. Supreme Court Rule X, Subdivision 3, does not require appellant to set out in his brief the reasons why he claims that the decision objected to is erroneous, and hence a specification that the court erred in sustaining defendant's motion for a nonsuit is sufficient without further statement.—*Nord v. Boston & Mont. Con. C. & S. M. Co.*, 48.

Briefs—Assignments of Error.

2. Assignments of error upon the admission or rejection of testimony not presented in appellant's brief in accordance with the requirements of the Rules of the Supreme Court, will not be considered by the court.—*Butte Mining & Milling Co. v. Kenyon*, 314.

Briefs—Specification of Errors.

3. Under the Rules of the Supreme Court, errors not specified in the brief will not be considered.—*Schilling v. Curran*, 370.

SPECIFIC PERFORMANCE.

Partition Sale—Deed—Pleadings.

1. Where it cannot be determined from either the pleadings or the evidence as to a contract to purchase property for another at a partition sale whether the purchaser was to furnish the money or not, or whether he was to take the deed in his own name or otherwise, neither would support a decree for specific performance on the part of the purchaser.—*Largey v. Leggat*, 148.

Complaint—Adequate Remedy at Law.

2. Where a complaint alleged breach of a contract to convey land described therein, it was sufficient to raise the presumption that pecuniary compensation would not afford adequate relief, within Civil Code, Section 4410, Subdivision 2, though there was no allegation of special circumstances showing that plaintiff had no adequate remedy at law.—*Christiansen v. Aldrich et al.*, 446.

Complaint.

3. In an action for specific performance of a contract to convey land, it was not necessary that the complaint should allege that defendants were the owners of the land at the time the contract was made, since, if defendants were not the owners, or had placed themselves in such a position that they could not perform their contract, such facts were matters of defense.—*Christiansen v. Aldrich et al.*, 446.

Answer.

4. In a suit for specific performance an answer alleging that, since the contract was made, defendants had conveyed the land in controversy to another, constituted an admission that defendants were the owners of the land at the time the contract was made.—*Christiansen v. Aldrich et al.*, 446.

Complaint—Technical Objections.

5. Under Code of Civil Procedure, Section 778, a technical objection to a complaint in a suit for specific performance not affecting the substantial

rights of the parties is not available after judgment.—*Christiansen v. Aldrich et al.*, 446.

Tender.

6. Where, in a suit for specific performance, it was alleged that defendants had withdrawn the deed from escrow, and it appeared that a tender of the balance of the price would not have been accepted and would have been of no avail, and plaintiff tendered the money in court, paid the same to the clerk, and demanded a deed, defendants having removed from the state and being absent at the time plaintiff desired to make payment, it was no objection that the complaint failed to allege a tender of the balance of the price before suit brought.—*Christiansen v. Aldrich et al.*, 446.

Defense—Statute of Frauds.

7. Where, in a suit for specific performance, defendant admitted the making of the contract, and relied on a defense other than the statute of frauds to defeat the action, such statute was not available as a defense unless specially pleaded.—*Christiansen v. Aldrich et al.*, 446.

Pleadings—Answer—Sufficiency.

8. Where, in a suit for specific performance, plaintiff pleaded a breach of the contract, and defendant alleged that plaintiff had failed to perform within the time prescribed, whereupon defendant had sold the land to W., but did not allege whether the sale to W. was before or after the commencement of the action, nor state any facts with reference to the consideration paid by W., and his notice of plaintiff's equity, the answer did not set up sufficient new matter to require replication.—*Christiansen v. Aldrich et al.*, 446.

Pleadings—Amendments.

9. In a suit for specific performance, plaintiff, pending a motion for judgment on the pleadings, applied for leave to amend the complaint by adding an allegation of tender of the unpaid purchase price, and a demand for a deed, and by making an allegation of readiness and willingness to perform more specific. *Held*, that the application was properly granted, defendants having declined the court's offer to postpone the hearing to the next term.—*Christiansen v. Aldrich et al.*, 446.

Mining Locations—Transfer of Interest—Insufficient Consideration.

10. Where complainants' entry on defendant's land for the purpose of locating a mining claim was wholly ineffectual as against defendant for that purpose, a contract by which complainants agreed to transfer to defendant an undivided one-third interest in the lead or lode, in consideration of defendant's transfer to plaintiffs of an undivided two-thirds interest therein, together with the necessary amount of real estate covered by the location, etc., in settlement of the rights of the parties without litigation, was not based on a sufficient consideration to support a suit for specific performance under Civil Code, Section 4417, providing that specific performance cannot be enforced against a person unless he has received an "adequate" consideration for the contract.—*Traphagen v. Kirk*, 562.

STATE OFFICERS.

Mandamus—Appropriations—Treasurer.

1. The writ of mandate will not be allowed to compel the state treasurer to pay a warrant issued by the state auditor, when the money particularly

appropriated by the legislature for such purpose has been exhausted.—
State ex rel. Donovan v. Barret, 203.

State Board of Examiners—Appropriations.

2. The state board of examiners cannot increase an appropriation made by the legislature for a specific purpose, by adding thereto moneys which the legislature appropriated for entirely different purposes.—*State ex rel. Donovan v. Barret*, 203.

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2. Writ lies where district court, in its order permitting an inspection of books, papers and underground workings of a mining claim, fails to fix

time at which inspection of books and papers may begin and must end, where order included letter-press copies and letters not relating to matters in issue, where order omitted to designate "the particular shaft through which it may be necessary for the plaintiff's agents to go in order to inspect the workings of the property," and failed to make allowance for the reasonable cost of the use of appliances for lowering and hoisting inspectors.—*State ex rel. Boston & Mont. Con. C. & S. M. Co. v. District Court*, 206.

District Court Rules—Transfer of Cause—Appeal.

3. By a rule of the district court of Silver Bow county, all matters of a criminal nature were to be heard in Department 3 of that court. An accusation under Penal Code, Section 1531, was filed in Department 1, and the judge of that department denied an application for the transfer of the cause to Department 3. *Held*, that the supreme court would not issue a writ of supervisory control to compel the removal of the case to Department 3, where it did not appear that, if Department 1 should proceed to a determination of the accusation, accused would suffer any injury for which an appeal would not furnish an adequate remedy.—*State ex rel. Clark v. District Court*, 442.

Exercise—Remedy—Irreparable Injury.

4. The supervisory control power was vested in the supreme court, not for the purpose of interfering at every stage of the proceedings in the district court and directing the conduct of the business there, but only under extraordinary circumstances, where there is no other remedy and a party litigant is, by some wrong committed by the court, liable to suffer irreparable injury.—*State ex rel. Clark v. District Court*, 442.

SURETIES.

Undertaking—Justification of Sureties.

1. Where appellee excepted to the sufficiency of the sureties, and they failed to justify within the statutory period, counsel for the parties had the right to stipulate for an extension of time within which the sureties might justify or a new undertaking be furnished.—*Morin v. Wells et al.*, 76.

Justification—Bond—Consideration.

2. The parties to an appeal from a justice stipulated for an extension of the time within which the sureties might justify after the time fixed by the statute for their justification had expired, and, within the time so stipulated for, defendant signed as a surety. Six months later, the appeal was dismissed. *Held*, that the signature of defendant was not without consideration; it being for the purpose of preventing the appeal from becoming ineffectual and it having, presumptively, operated to stay proceedings for several months.—*Morin v. Wells et al.*, 76.

Public Policy—Defendant as Surety.

3. Defendant's action in becoming a surety, when he did, was not contrary to a mandatory statute nor prohibited by public policy.—*Morin v. Wells et al.*, 76.

Bail Bond—Defense.

4. The fact that a magistrate accepting a bail bond failed to comply with the statute requiring it to be filed in the district court was no defense to the sureties in an action on the bond.—*State v. Lagoni et al.*, 472.

Action on Bail Bond—Defense.

5. Where the county attorney fails to comply with Penal Code, Section 1730, any advantage thereof must be taken by defendant by motion to set aside the information, which must be done before demurrer or plea, and failure to so take advantage of the irregularity waives it. The negligence of the county attorney in this respect cannot be taken advantage of by the sureties on defendant's bail bond.—*State v. Lagoni et al.*, 472.

Action on Bail Bond—Defense.

6. The fact that a magistrate made a verbal order of release, instead of complying with Penal Code, Section 2354, was no defense to a surety in an action on the bail bond.—*State v. Lagoni et al.*, 472.

Action on Bail Bond—Death of Principal.

7. In an action on a bail bond defendant sureties pleaded that the principal in the bond, who had disappeared, was dead, when the bond was declared forfeited, and a witness testified for defendants that he knew of the principal having attempted to commit suicide on two different occasions. *Held*, that the testimony was properly stricken as immaterial.—*State v. Lagoni et al.*, 472.

Bail Bond—Death of Principal—Offer of Proof.

8. In an action on a bail bond it appeared that the principal was charged with a felony about the middle of June, and that the case came on for trial in the following November, and defendant sureties offered to prove, in order to establish the death of their principal, that he was an old man; that on two or three occasions he had attempted suicide; that he lived in a place the surroundings of which were such that a body might lie for weeks, months and even years without discovery; that he had never been seen or heard of since about a week before the forfeiture of the bond, and that no trace had ever been found of him. *Held*, that the offer was properly denied.—*State v. Lagoni et al.*, 472.

TAXATION.

Mining Claims—Surface—Use for Purpose Other than Mining.

1. Constitution, Article XII, Section 3, and Political Code, Section 3672, declare that all mines and mining claims, after purchase from the government, shall be taxed at the price paid the government, and that if the surface ground, or any portion thereof, is valuable for any other purpose than mining, it shall be taxed at its value for such other purpose. A mining claim was within the limits of a city, and, while it had never been made an addition to the city, the owners had made a plat, and sold lots and blocks from the claim for townsite purposes; describing the portions sold by metes and bounds. The owners of the claim claimed that a portion thereof was reserved for mining purposes, and not taxable for any purpose other than mining; and it appeared that a shaft had once been sunk on such reserve, but that it had been abandoned, and that the lot on which the shaft was sunk had been sold. *Held*, that the so-called reserve was taxable for purposes other than mining.—*Murray et al. v. Hinds et al.*, 466.

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appropriated by the legislature for such purpose has been exhausted.—
State ex rel. Donovan v. Barret, 203.

State Board of Examiners—Appropriations.

2. The state board of examiners cannot increase an appropriation made by the legislature for a specific purpose, by adding thereto moneys which the legislature appropriated for entirely different purposes.—*State ex rel. Donovan v. Barret*, 203.

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STATUTORY CONSTRUCTION.

Appeal—Liberal Construction.

1. Statutes must be liberally construed to maintain the right of appeal.—*Morin v. Wells et al.*, 76.

Interpretation—Proclamation of Governor.

2. Legislation passed at an extraordinary session of the legislature must be interpreted in the light of the proclamation of the governor convening such session.—*State ex rel. Boston & Mont. Con. C. & S. M. Co. v. Judges*, 193.

STATUTE OF FRAUDS.

Judicial Sale—Oral Agreement—Conveyance.

1. An oral agreement by a purchaser at a judicial sale to take the deed in his own name, and convey to another, is void, as within the statute of frauds (Civil Code, Section 2342).—*Largey v. Leggat*, 148.

Trustee *Ex Maleficio*—Agreement.

2. The agreement cannot be taken out of the statute, and enforced against the purchaser as a trustee *ex maleficio*, to prevent the perpetration of a fraud, where neither party had any interest in the property, and no money was advanced to the purchaser, or anything done towards carrying the agreement into effect.—*Largey v. Leggat*, 148.

Sale of Personalty—Part Performance.

3. Under Civil Code, Section 2340, declaring invalid a sale of personalty for \$200 or more, not in writing, unless the buyer accepts and receives part of the thing sold, the acceptance and receipt need not be concurrent with the purchase.—*Slater Brick Co. v. Shackleton*, 390.

Sale of Personalty—Part Performance—Sufficiency.

4. Under Civil Code, Section 2340, making valid a sale of personalty, for \$200 or more, though not in writing, if the buyer accepts and receives part of the thing sold, such acceptance and receipt by one who assumes the buyer's contract is sufficient.—*Slater Brick Co. v. Shackleton*, 390.

Specific Performance—Defense—Availability.

5. Where, in a suit for specific performance, defendant admitted the making of the contract, and relied on a defense other than the statute of frauds to defeat the action, such statute was not available as a defense unless specially pleaded.—*Christiansen v. Aldrich et al.*, 446.

STENOGRAPHERS.

Official and Private Transcripts.

1. In making up statements or bills of exceptions, litigants are under no obligation to use only the transcript of the evidence furnished by the official stenographer. They may for that purpose use the notes of any person which furnish a correct narrative of the proceedings.—*York v. Steward*, 367.

STOCK AND STOCKHOLDERS.

Corporations—Action Against Officers—Misappropriation of Funds.

1. Though a corporation is necessarily made a party to an action against its officers for fraudulently diverting and misappropriating its funds, and though the action is brought in the name of the plaintiffs, who are minority stockholders, is in reality on behalf of the corporation.—*McConnell et al. v. Combination M. & M. Co.*, 239.

Condition Precedent to Action—Minority Stockholders.

2. Demand on the officials of a corporation to bring suit for fraud of officers and directors in misappropriating its funds is not a condition precedent to action by the minority stockholders.—*McConnell et al. v. Combination M. & M. Co.*, 239.

Officers and Directors—Action for Fraud—Evidence.

3. In an action by minority stockholders against the officers and directors of a corporation for fraudulently diverting and misappropriating its funds, evidence examined, and *held* sufficient to charge the president and secretary with knowledge of all expenditures made, to whom they were made, and for what purpose.—*McConnell et al. v. Combination M. & M. Co.*, 239.

Ratification—Estoppel—Minority.

4. Though the majority stockholders of a corporation sanction the acts of its directors and officials in illegally making expenditures of the corporate funds, so as to bind themselves by estoppel, yet such acts are not binding on stockholders who neither took part in the proceedings, nor sanctioned, by act or acquiescence, the making of the expenditures.—*McConnell et al. v. Combination M. & M. Co.*, 239.

Voting Salaries to Directors—Powers of Directors.

5. In the absence of power emanating from the stockholders, from statute, or from by-laws legally adopted, directors of a corporation have no authority to vote a salary to any of their number.—*McConnell et al. v. Combination M. & M. Co.*, 239.

Minutes—Evidence—Admissibility.

6. Minutes of a stockholders' meeting, consisting of separate sheets of paper pinned to the leaves of a record book, are insufficiently identified to make them admissible.—*McConnell et al. v. Combination M. & M. Co.*, 239.

SUPERVISORY CONTROL.

Mines—Injunction—Contempt—Evidence Insufficient.

1. Writ lies to vacate an order adjudging relators guilty of contempt for the violation of an injunction restraining them from working mining property, where much of the evidence was speculative "and based on projections made on conclusions from facts observed in workings remote from the points in controversy." *Held*, not sufficient to sustain a conviction.—*State ex rel. Boston & Mont. Con. C. & S. M. Co. v. District Court*, 96.

Mines—Defective Inspection Order.

2. Writ lies where district court, in its order permitting an inspection of books, papers and underground workings of a mining claim, fails to fix

RULES OF SUPREME COURT.

Briefs—Specification of Errors.

1. Supreme Court Rule X, Subdivision 3, does not require appellant to set out in his brief the reasons why he claims that the decision objected to is erroneous, and hence a specification that the court erred in sustaining defendant's motion for a nonsuit is sufficient without further statement.—*Nord v. Boston & Mont. Con. C. & S. M. Co.*, 48.

Briefs—Assignments of Error.

2. Assignments of error upon the admission or rejection of testimony not presented in appellant's brief in accordance with the requirements of the Rules of the Supreme Court, will not be considered by the court.—*Butte Mining & Milling Co. v. Kenyon*, 314.

Briefs—Specification of Errors.

3. Under the Rules of the Supreme Court, errors not specified in the brief will not be considered.—*Schilling v. Curran*, 370.

SPECIFIC PERFORMANCE.

Partition Sale—Deed—Pleadings.

1. Where it cannot be determined from either the pleadings or the evidence as to a contract to purchase property for another at a partition sale whether the purchaser was to furnish the money or not, or whether he was to take the deed in his own name or otherwise, neither would support a decree for specific performance on the part of the purchaser.—*Largcy v. Leggat*, 148.

Complaint—Adequate Remedy at Law.

2. Where a complaint alleged breach of a contract to convey land described therein, it was sufficient to raise the presumption that pecuniary compensation would not afford adequate relief, within Civil Code, Section 4410, Subdivision 2, though there was no allegation of special circumstances showing that plaintiff had no adequate remedy at law.—*Christiansen v. Aldrich et al.*, 446.

Complaint.

3. In an action for specific performance of a contract to convey land, it was not necessary that the complaint should allege that defendants were the owners of the land at the time the contract was made, since, if defendants were not the owners, or had placed themselves in such a position that they could not perform their contract, such facts were matters of defense.—*Christiansen v. Aldrich et al.*, 446.

Answer.

4. In a suit for specific performance an answer alleging that, since the contract was made, defendants had conveyed the land in controversy to another, constituted an admission that defendants were the owners of the land at the time the contract was made.—*Christiansen v. Aldrich et al.*, 446.

Complaint—Technical Objections.

5. Under Code of Civil Procedure, Section 778, a technical objection to a complaint in a suit for specific performance not affecting the substantial

rights of the parties is not available after judgment.—*Christiansen v. Aldrich et al.*, 446.

Tender.

6. Where, in a suit for specific performance, it was alleged that defendants had withdrawn the deed from escrow, and it appeared that a tender of the balance of the price would not have been accepted and would have been of no avail, and plaintiff tendered the money in court, paid the same to the clerk, and demanded a deed, defendants having removed from the state and being absent at the time plaintiff desired to make payment, it was no objection that the complaint failed to allege a tender of the balance of the price before suit brought.—*Christiansen v. Aldrich et al.*, 446.

Defense—Statute of Frauds.

7. Where, in a suit for specific performance, defendant admitted the making of the contract, and relied on a defense other than the statute of frauds to defeat the action, such statute was not available as a defense unless specially pleaded.—*Christiansen v. Aldrich et al.*, 446.

Pleadings—Answer—Sufficiency.

8. Where, in a suit for specific performance, plaintiff pleaded a breach of the contract, and defendant alleged that plaintiff had failed to perform within the time prescribed, whereupon defendant had sold the land to W., but did not allege whether the sale to W. was before or after the commencement of the action, nor state any facts with reference to the consideration paid by W., and his notice of plaintiff's equity, the answer did not set up sufficient new matter to require replication.—*Christiansen v. Aldrich et al.*, 446.

Pleadings—Amendments.

9. In a suit for specific performance, plaintiff, pending a motion for judgment on the pleadings, applied for leave to amend the complaint by adding an allegation of tender of the unpaid purchase price, and a demand for a deed, and by making an allegation of readiness and willingness to perform more specific. *Held*, that the application was properly granted, defendants having declined the court's offer to postpone the hearing to the next term.—*Christiansen v. Aldrich et al.*, 446.

Mining Locations—Transfer of Interest—Insufficient Consideration.

10. Where complainants' entry on defendant's land for the purpose of locating a mining claim was wholly ineffectual as against defendant for that purpose, a contract by which complainants agreed to transfer to defendant an undivided one-third interest in the lead or lode, in consideration of defendant's transfer to plaintiffs of an undivided two-thirds interest therein, together with the necessary amount of real estate covered by the location, etc., in settlement of the rights of the parties without litigation, was not based on a sufficient consideration to support a suit for specific performance under Civil Code, Section 4417, providing that specific performance cannot be enforced against a person unless he has received an "adequate" consideration for the contract.—*Traphagen v. Kirk*, 562.

STATE OFFICERS.

Mandamus—Appropriations—Treasurer.

1. The writ of mandate will not be allowed to compel the state treasurer to pay a warrant issued by the state auditor, when the money particularly

appropriated by the legislature for such purpose has been exhausted.—
State ex rel. Donovan v. Barret, 203.

State Board of Examiners—Appropriations.

2. The state board of examlners cannot increase an appropriation made by the legislature for a specific purpose, by adding thereto moneys which the legislature appropriated for entirely different purposes.—*State ex rel. Donovan v. Barret*, 203.

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